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No. 011534

IN THE

Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court concluded that a ban on the sale of Indian artifacts with golden eagle feathers was not a taking in violation of the Fifth Amendment even if the feathered artifacts predated the Bald and Golden Eagle Protection Act, which imposed the ban in 1962. Since *Allard*, this Court has held that a statute burdening property is a violation of the Takings Clause if it does not "substantially advance" a legitimate state interest or deprives the owner of the economic value of his property. The courts below concluded that they were precluded by *Allard* from applying these standards to Petitioner's case, which involves a Native American headdress and Sioux dance shield obtained by his great uncle, about 1904, while working for Buffalo Bill's Wild West Show.

The questions presented are:

1. Is *Andrus v. Allard* still good law despite its inconsistency with subsequent opinions of this Court, the almost unanimous criticism of commentators, and the confusion it has promoted in the lower courts?

2. Is it an unconstitutional taking of private property to impose criminal sanctions on the sale of innocuous, historically significant, antique Indian artifacts containing golden eagle feathers where Petitioner's ownership of those artifacts predates the statutory protection of the golden eagle, there is no evidence that the ban on sale substantially advances protection of the golden eagle, and the effect of the ban is to destroy the economic value of the artifacts?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
The Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. *Andrus v. Allard* Conflicts with Subsequent Opinions of This Court That Have Required a Regulation Burdening Property "Substantially Advance Legitimate State Interests"	8
A. *Andrus v. Allard* Applied a "Rational Basis" Test Rather Than the "Substantially Advance" Standard in Evaluating the Nexus Between the Ban on Sale and Protection of the Golden Eagle	9
B. *Andrus v. Allard* Has Promoted Confusion in the Lower Courts on the Applicability of the "Substantially Advance" Standard	12

II. In Subsequent Opinions This Court Has Rejected the Conclusion in *Andrus v. Allard* That the Destruction of One "Strand" of a Bundle of Rights Does Not Constitute a Taking 15

III. The Destruction of All Economically Beneficial or Productive Use of Antique Feathered Indian Artifacts Is a Taking Under the Logic of *Lucas v. South Carolina Coastal Council* 21

IV. Violation of the Takings Clause is a Defense to a Criminal Prosecution 26

Conclusion 28

TABLE OF AUTHORITIES

Cases: **Page(s)**

Agins v. Tiburon,
447 U.S. 255 (1980) 4, 10, 12, 15, 28

Agostini v. Felton,
521 U.S. 203 (1997) 5

Allard v. Andrus,
9 Envtl. L. Rep. 20787 (D. Colo. 1978), *rev'd sub. nom.*, *Andrus v. Allard*, 444 U.S. 51 (1979) 7-8, 11

American Pelagic Fishing Co. v. United States,
49 Fed.Cl. 36 (2001) 25-26

Andrus v. Allard,
444 U.S. 51 (1979) ..... *passim*

Armstrong v. United States,
364 U.S. 40 (1960) 12, 29

Babbitt v. Youpee,
519 U.S. 234 (1997) 4, 11, 19

Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck,
94 N.Y.2d 96, 721 N.E.2d 971, 699 N.Y.S.2d 721 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000) 13

Chevron USA, Inc. v. Cayetano,
224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001) 13

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 11

Cohen v. California, 403 U.S. 15 (1971) 27

Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) 13

Dep't of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990) 13

Dolan v. City of Tigard, 512 U.S. 374 (1994) 11, 14

Greenfield Country Estates Tenants Association, Inc. v. Deep, 423 Mass. 81, 666 N.E.2d 988 (Mass. 1996) 20

Haynes v. United States, 390 U.S. 85 (1968) 27

Hodel v. Irving, 481 U.S. 704 (1987) 4, 17-19

In re Winship, 397 U.S. 358 (1970) 26

Long Cove Club Associates, L.P. v. Town of Hilton Head Island, 319 S.C. 30, 458 S.E.2d 757 (S.C.), *cert. denied*, 516 U.S. 1029 (1995) 24

Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555 (1935) 27

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 4, 19, 21-25, 29

Manufactured Housing Communities of Washington v. State,
142 Wash.2d 347, 13 P.3d 183
(Wash. 2000) 20

Maritrans Inc. v. United States,
40 Fed.Cl. 790 (1998)..... 24

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. Sup. Ct. 1998), *cert. denied*, 526 U.S. 1144 (1999) 14

McElwain v. County of Flathead,
248 Mont. 231, 811 P.2d 1267 (Mont. 1991),
cert. denied, 502 U.S. 1030 (1992) 13

Nixon v. United States,
978 F.2d 1269 (D.C. Cir. 1992) 24

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 4, 10, 14, 28

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 19

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 26

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 5

San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (Cal. 2002) 13

Santa Monica Beach, Ltd. v. Superior Court, 19 Cal. 4th 952, 968 P.2d 993, 81 Cal.Rptr.2d 93 (Cal.), *cert. denied*, 526 U.S. 1131 (1999) 13-14

Stanley v. Georgia, 394 U.S. 557 (1969) 27

United States v. Dion, 476 U.S. 734 (1986) 23

United States v. General Motors Corp., 323 U.S. 373 (1945) 20, 25-26

United States v. Kepler, 531 F.2d 796 (6th Cir. 1976) 27

United States v. Kornwolf, 276 F.3d 1014 (8th Cir. 2002) 1, 6

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) 12

Wilson v. City of Louisville, 957 F.Supp. 948 (W.D. Ky. 1997) 24

Yee v. City of Escondido, 503 U.S. 519 (1992) 28

Younger v. Harris, 401 U.S. 37 (1971) 27

Constitutional Provisions:

U.S. CONST. amend. V ..... *passim*

Statutes and Regulations:

Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a) (2000) ..... *passim*

Migratory Bird Treaty Act, 16 U.S.C. §§703, 707(b) (2000) ..... *passim*

16 U.S. C. §§1531, 1533 29

28 U.S.C. §1254(1) 2

50 C.F.R. §17.11 29

50 C.F.R. §22.2(a)(1)-(2) (1999) 2

Secondary Sources:

14 James Madison, *The Papers of James Madison* 266 (R. Rutland & T. Mason eds. 1983) 22

66 Fed. Reg. 61663 (Dec. 3, 2001) 30

Brief for Appellants, *Andrus v. Allard*, 444 U.S. 51 (1979) 28

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 76 (1985) 19-20

Exchange of Notes, U.S. - Mexico, March 10, 1972, 23 U.S.T. 260 3

William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L.Rev. 1 (1995) 11, 17, 21-22

Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum.L.Rev. 1630 (1998) 19

Ronald McCoy, *Legal Briefs: Feathers*, 16 Am. Indian Art Mag. 20 (No. 3, Summer 1991) 15-16

Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L.Rev. 591 (1998) 12, 19

Respondent's Brief on the Merits, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) 23

Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum.L.Rev. 931 (1985) 11

Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993) 20, 23-24

S. Rep. No. 87-1986 (1962) 29

Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan.L.Rev. 305 (1997) 24

William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Timothy Patrick Kornwolf respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered January 16, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 276 F.3d 1014 (8th Cir. 2002), and is reprinted in the Appendix (App. A-3). The orders of the United States District Court for the District of Minnesota (Doty, J.) denying Petitioner's motions to dismiss the superseding indictment and the original indictment are unpublished and are reported in

the Appendix at A-25 and A-29, respectively. The report and recommendation of the magistrate with respect to each motion is unpublished. These recommendations are reprinted in the Appendix at A-32 and A-37.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on January 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

The pertinent provisions of the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a), the Migratory Bird Treaty Act, 16 U.S.C. §§703, 707(b), and the regulations of the U.S. Fish and Wildlife Service, Department of the Interior, 50 C.F.R. §22.2(a)(1)-(2), are set out in the Appendix at A-45 to A-47.

STATEMENT OF THE CASE

On July 7, 2000, Petitioner Timothy Patrick Kornwolf ("Kornwolf") was charged with four counts of violating the Bald and Golden Eagle Protection Act, 16 U.S.C. §668 (hereinafter "Eagle Protection Act"). (App. A-53). The indictment arose out of Kornwolf's sale of a Sioux dance shield, and his offer to sell a Native American headdress, to an undercover Norwegian law enforcement officer working with the United States Fish and Wildlife Service. Both of these antique Indian artifacts

contained golden eagle feathers. (*See* color photographs at A-72 and A-73). On September 7, 2000, the government filed a superseding indictment which added four counts alleging violations of the Migratory Bird Treaty Act, 16 U.S.C. §703, based on the same conduct described in the original indictment. (App. A-48).

The dance shield and headdress had been in Kornwolf's family for almost a hundred years. Kornwolf's great uncle had acquired these items around 1904 while working for Buffalo Bill's Wild West Show. (App. A-56). It was undisputed below that he gave these items to Kornwolf prior to October 24, 1962, when the golden eagle was first included within the protections of the Eagle Protection Act.[1]

Under both the Eagle Protection Act and the Migratory Bird Treaty Act, it is unlawful to sell or attempt to sell golden eagle parts, such as feathers. In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court construed these statutory bans as extending even to golden eagle feathers lawfully acquired prior to October 24, 1962, that were part of Indian artifacts.

Kornwolf moved to dismiss the indictments on the ground that banning the sale of antique feathered Indian artifacts that he owned prior to October 24, 1962, effectively destroyed the value of his property without compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. The district court, the Honorable David S. Doty, over-

[1]The golden eagle did not come within the protection of the Migratory Bird Treaty Act until 1972, when the bird family "accipitridae" was added to the convention between the United States and Mexico. *Exchange of Notes*, U.S. - Mexico, March 10, 1972, 23 U.S.T. 260.

ruled these motions. He concluded that Kornwolf's Fifth Amendment argument was controlled by *Andrus v. Allard*, where over twenty-two years ago this Court rejected a Fifth Amendment challenge to these statutes. In denying the motion to dismiss the superseding indictment, the district court stated:

> This court's ruling on the prior motion to dismiss and the magistrate judge's recommendation on the current motion to dismiss make it clear that unless the Supreme Court overrules *Allard*, the congressional prohibition on the sale of *all* eagle feathers stands as a lawful means to protect and preserve threatened and endangered bird species.

(App. A-27) (emphasis in original).

On October 31, 2000, Kornwolf entered a conditional plea to four counts of the superseding indictment. The plea specifically reserved Kornwolf's right to withdraw his plea if on appeal the Eagle Protection Act and the Migratory Bird Treaty Act were held unconstitutional as applied to the facts of this case. (App. A-69 at ¶16). Kornwolf was sentenced to three years probation, with a special condition of 180 days in a home detention program, and a fine of $10,000. (App. A-15 to A-19). Because his appeal raised "a substantial question of law," the district court stayed Kornwolf's sentence pending appeal. (App. A-11).

On appeal, Kornwolf argued that the legal analysis that this Court employed in *Andrus v. Allard* has been eviscerated by subsequent opinions of this Court, including *Agins v. Tiburon*, 447 U.S. 255 (1980); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Babbitt*

v. Youpee, 519 U.S. 234 (1997). Under these more recent precedents, the relevant questions are: (1) whether prohibiting the sale of antique Indian artifacts that include golden eagle feathers, even if they have a known provenance that predates 1962, substantially advances the protection of the golden eagle; and (2) whether the ban on sale of these artifacts deprives Kornwolf of the economic value of his property.

The district court found that it was precluded from undertaking this analysis by *Andrus v. Allard*. In the magistrate's report and recommendation to the district court on the motion to dismiss the superseding indictment, the magistrate observed:

> The Supreme Court has repeatedly held that if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in another line of Supreme Court decisions, the lower courts must follow the case which directly controls, leaving the Supreme Court to overrule its own decision if it so chooses. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

(App. A-34). This report and recommendation was adopted by the district court. (App. A-25).

Kornwolf argued on appeal that *Andrus v. Allard* did not directly control his case. *Allard* was a declaratory judgment action that in essence mounted a facial challenge to the constitutionality of the Eagle Protection Act and the Migratory Bird Treaty Act. The only constitutional question before the *Allard* Court was whether banning the sale of feathers obtained from golden eagles killed prior to 1962 was unconstitutional *under any and all circumstances*. The Court did not discuss the prov-

enance or value of any of the artifacts owned by the plaintiffs in that case. In fact, there was no evidence in *Allard* that any of the plaintiffs had possessed any of their feathered artifacts prior to 1962. 444 U.S. at 64 n. 21.

Therefore, Kornwolf maintained on appeal that the *Allard* Court did not address the specific question raised by this case, *i.e.*, whether, as a constitutional matter, an individual can be criminally prosecuted for sale of specific artifacts that contain golden eagle feathers despite uncontroverted evidence that he came into possession of those artifacts prior to 1962. Since *Allard* did not directly control his case, Kornwolf argued that the court of appeals had to review his conviction in light of this Court's more recent takings jurisprudence.

The United States Court of Appeals for the Eighth Circuit disagreed. *United States v. Kornwolf*, 276 F.3d 1014 (8th Cir. 2002). In an opinion by Senior Judge Donald Lay, the court concluded that *Allard* was directly controlling and that, as a result, it "need not examine the present case in light of recent takings cases." (App. A-9). The Eighth Circuit stayed issuance of the mandate pending disposition of this Petition for a Writ of Certiorari. (App. A-2).

REASONS FOR GRANTING THE WRIT

This case presents the Court with apparently its first direct opportunity in almost twenty-three years to reconsider the holding and logic of its opinion in *Andrus v. Allard*, 444 U.S. 51 (1979). As a historical matter, *Allard* is the high-water mark of this Court's solicitude to governmental regulation of private property. Prior to *Allard*, a three-judge court could accurately report "that the Supreme Court has never upheld the power of

Congress to deprive a person forever of the right to dispose of his private property through commercial channels where such property was legally acquired – in contravention of no public policy – and where the property is not only harmless in itself, but also has intrinsic value." *Allard v. Andrus*, 9 Envtl. L. Rep. 20787, 20789 (D.Colo. 1978), *rev'd sub nom. Andrus v. Allard*, 444 U.S. 51 (1979).

Since *Allard*, this Court has decided a number of takings cases that demonstrate both a greater concern for the burdens placed on property owners by governmental regulations and less willingness to assume a justifying nexus between those burdens and a public purpose. Indeed, where regulation effectively destroys the economic value of private property, which is precisely the intended effect of the species protection acts at issue here, this Court has in recent years presumed an unconstitutional taking subject to the government demonstrating that the restriction on the owner's property is justified by the law of nuisance. The government has not maintained, nor could it credibly maintain, that the sale of antique Indian artifacts is a nuisance.

These developments have left *Allard* an anomalous and puzzling precedent that has promoted confusion about, and disparate interpretations of, this Court's takings cases. It should be overruled or otherwise reconciled with the subsequent takings opinions of this Court.

I

Andrus v. Allard Conflicts with Subsequent Opinions of This Court That Have Required a Regulation Burdening Property "Substantially Advance Legitimate State Interests"

The *Allard* Court reviewed the judgment of a three-judge court, which had concluded that, since it had "grave doubts whether [the Eagle Protection Act and the Migratory Bird Treaty Act] would be constitutional if they were construed to apply to pre-act bird products," these acts should be interpreted as "not applicable to preexisting, legally-obtained bird parts or products therefrom...." *Allard v. Andrus*, 9 Envtl.L.Rep. 20787, 20789 (D.Colo. 1978). The three-judge court observed:

> The application of these acts to the plaintiffs' artifacts has a destructive and confiscatory effect on preexisting property rights in these items. The questioned regulations have destroyed the right to sell them. Assuming that there is no "scientific method" for detecting the age of feathers, these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination. The defendants have failed to show any efforts to establish a registration system.

Id. at 20788.

In his opinion for the Court reversing this judgment, Justice Brennan cited two principal grounds for upholding application of the statutes to pre-existing artifacts: that the prohibition on sale of bird parts lawfully obtained was consistent with the wording of the statutes and "reasonable," *Andrus v. Allard*, 444 U.S. 51, 58

(1979), and that the destruction of one "strand" in the owner's bundle of rights in these artifacts is not a taking. *Id.* at 65-66. Both grounds have been undermined or explicitly rejected by subsequent opinions of this Court.

A. Andrus v. Allard *Applied a "Rational Basis" Test Rather Than the "Substantially Advance" Standard in Evaluating the Nexus Between the Ban on Sale and Protection of the Golden Eagle*

Although the legislative history of the Eagle Protection Act was silent on the logic of extending the Act's prohibitions to the sale of pre-existing bird parts, in *Allard,* Justice Brennan *speculated* that Congress might have been concerned that if the sale of pre-existing bird parts was not prohibited, the statute might be evaded "because there is no sure means by which to determine the age of bird feathers" and that "feathers recently taken can easily be passed off as having been obtained long ago." *Id.* at 58. There would therefore be an incentive to kill live eagles. Moreover, Justice Brennan concluded, "even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and convenient." *Id.* at 58-59.

Justice Brennan's references to possible legislative justifications for banning the sale of pre-existing bird parts were not part of his discussion of the Fifth Amendment takings claim. Rather they were part of his statutory analysis, where the question was whether it was "rational" to interpret these statutes as banning the sale of pre-existing bird parts. *See id.* at 55-64. This suggests that either the *Allard* Court did not regard the

justification for the ban on sale as pertinent to the Fifth Amendment analysis, or it concluded that the question under the Fifth Amendment was merely the same, *i.e.*, whether there was a rational relationship between the ban on sale of pre-existing parts and protection of the golden eagle.

This Court's Fifth Amendment takings cases since *Allard*, however, have required that a regulation burdening private property be justified by its ability to achieve a legitimate governmental purpose. In *Agins v. Tiburon*, 447 U.S. 255 (1980), this Court observed that a regulation affecting property constitutes a taking under the Fifth Amendment if it does not "substantially advance legitimate state interests" or denies an owner economically viable use of his property. *Id.* at 260.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court emphasized that the "substantially advance" standard is not the same as the rational basis test. Justice Scalia observed for the *Nollan* Court, "We have required [in takings cases] that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.'" *Nollan*, 483 U.S. at 834 n.3 (emphasis in original). Yet the latter "rational basis" test was the standard applied in *Allard*.

No court has determined that the prohibition on sale of Indian artifacts containing lawfully obtained golden eagle parts "substantially advances" protection of the golden eagle. The government has presented "no evidence of any causal relation between the killing of eagles (or other birds) and the sale of Indian artifacts

containing bird feathers." William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 67 (1995) (characterizing *Allard* as unsound).[2] Moreover, as the *Allard* three-judge court and commentators have observed, the statutes protecting the golden eagle could have been "enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination."[3] *Allard v. Andrus*, 9 Envtl. L. Rep. 20787, 20788 (D. Colo. 1978). *See also* Jones, *supra*, at 68; Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum. L. Rev. 931, 945 (1985) ("a number of alternatives were open to the Interior Department that would have provided some form of compensation without undermining the legislative purpose").

In *Allard*, Justice Brennan ultimately concluded that

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[2] Professor William K. Jones, the Charles Evans Hughes Professor of Law at the Columbia University School of Law, reviewed the briefs and record before this Court in *Allard* and concluded that the "Government was compelled to rely on the proposition that the regulation should be sustained if supported by 'any state of facts either known or which could reasonably be assumed.'" William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 67-68 (1995).

[3] This Court has acknowledged that "concerns for proportionality animate the Takings Clause." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). It has found that a regulation that burdens private property is constitutionally deficient when the asserted governmental interest could have been advanced by a more narrowly drawn restriction. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 245 (1997) (statute prohibited devise of property that involved only one heir and therefore did not further fractionate Indian land holdings); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (land use regulation unconstitutional where not roughly proportional to legitimate state interest).

it was administratively convenient for Congress to ban the sale of artifacts with eagle feathers even when the feathers were lawfully obtained. If "administrative convenience," however, is enough to "substantially advance" a legitimate state interest, this prong of the *Agins* test is meaningless. It would be a rare case where it would not be administratively convenient to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While administrative convenience may be an appropriate justification under a "rational basis" test, it cannot be enough to "substantially advance" a legitimate state interest. *See generally Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-53 (1980) (administrative convenience is generally insufficient to show gender-based discrimination is "substantially related" to important governmental objectives).

B. Andrus v. Allard *Has Promoted Confusion in the Lower Courts on the Applicability of the "Substantially Advance" Standard*

Allard, therefore, has helped promote confusion in the lower courts about whether the "substantially advance" test in fact applies to all takings cases and whether, in substance, it is different from the rational basis test. As one commentator has observed, "Because of this ambiguity in Supreme Court opinions, lower courts have disagreed on whether takings jurisprudence now requires a closer examination of the means-end relationship between regulations and the goals of the government." Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 604 (1998). Interpretations in the lower courts have ranged from "substantially advance"

being a universally applicable "least restrictive means" standard,[4] to a variable standard that depends on the context in which it is applied,[5] to a mere test of "arbitrariness" or unreasonableness.[6] The United States Court of Appeals for the Ninth Circuit has further confused the standard by stating that the "substantially advance" standard is not a reasonableness test, yet finding it can be satisfied by a "reasonable relationship" between the regulation and the governmental purpose.[7] As one state supreme court judge has commented on the "substantially advance" standard:

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[4]*McElwain v. County of Flathead*, 248 Mont. 231, 235, 811 P.2d 1267, 1270 (Mont. 1991), *cert. denied*, 502 U.S. 1030 (1992).

[5]*San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 665-72, 41 P.3d 87, 117 Cal.Rptr.2d 269, 286-92 (Cal. 2002) ("substantially advance" standard applied differently depending on type of government restriction under consideration; development exactions receive highest scrutiny; in other contexts standard means "reasonable relationship"); *Dep't of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1005-06 (Ind. 1989), ("substantially advance" standard not particular level of scrutiny to be applied across the board), *cert. denied*, 493 U.S. 1078 (1990)

[6]*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 972, 968 P.2d 993, 1005, 81 Cal.Rptr.2d 93, 105 (Cal.) ("legislation may not be invalidated under the 'substantially advance' prong of takings analysis unless it 'constitutes an arbitrary regulation of property rights'"), *cert. denied*, 526 U.S. 1131 (1999); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107-08, 721 N.E.2d 971, 975-76, 699 N.Y.S.2d 721, 725-26 (N.Y. 1999) ("substantially advance" standard in takings cases not involving exactions is "reasonable relationship" test; availability of less restrictive options is irrelevant), *cert. denied*, 529 U.S. 1094 (2000).

[7]*Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1036-37, 1041-42 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); *see also Commercial Builders v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir.

Continued on Next Page

> [T]here are grounds for reasonable debate as to the meaning of that test in just compensation law outside the *Nollan / Dolan* context. Does it require only a rational relationship between the regulation and its purpose? Or a closer connection between means and ends, adapted from the *Nollan / Dolan* test? Or some other degree of connection between means and ends? I urge the high court to resolve this uncertainty.

Santa Monica Beach, Ltd. v. Superior Court, 19 Cal.4th 952, 981, 968 P.2d 993, 1012, 81 Cal.Rptr.2d 93, 112 (Cal.) (Kennard, J., concurring), *cert. denied*, 526 U.S. 1131 (1999). *See also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. Sup. Ct. 1998) ("what relation between a regulation and the state interest satisfies the 'substantially advance' requirement in a regulatory takings case has not been clarified by the United States Supreme Court"), *cert. denied*, 526 U.S. 1144 (1999).

This case is an excellent vehicle to address these questions. Given the unique factual context of most takings cases, it is difficult for lower courts to draw out principles of general applicability. However, that is not true of this case. It arises in a context that is factually straightforward, and the case has a historical benchmark in *Allard*. No court has asked, let alone determined, whether the ban on sale of antique Indian artifacts that include lawfully-acquired golden eagle feathers "substantially advances" protection of the golden

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Footnote 7 Continued

1991) ("*Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld") (emphasis added), *cert. denied*, 504 U.S. 931 (1992).

eagle. A reexamination of the ban on sale of lawfully acquired golden eagle feathers with the benefit of the last twenty years of takings jurisprudence will provide the lower courts with intelligible guidance on the applicability and meaning of the "substantially advance" standard in takings cases generally.

II

In Subsequent Opinions This Court Has Rejected the Conclusion in *Andrus v. Allard* That the Destruction of One "Strand" of a Bundle of Rights Does Not Constitute a Taking

The lack of a justifying nexus in *Allard* is far from its only inconsistency with subsequent decisions of this Court. Even where a regulation "substantially advances" a legitimate governmental interest, the effect of that regulation on private property constitutes a compensable taking under the Fifth Amendment if it denies an owner "economically viable" use of his property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In *Allard*, Justice Brennan acknowledged as "undeniable" the proposition that the prohibition on sale of bird parts that were lawfully obtained deprived owners of antique feathered Indian artifacts of the most profitable use of their property. *Allard*, 444 U.S. at 66. Indian artifacts containing eagle feathers, for example, either cannot be sold or can only be sold by destroying the integrity and authenticity of the artifact by removing the original feathers.[8]

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[8]One of the unfortunate consequences of *Allard* is the incentive it creates to destroy historically significant Indian artifacts. Ronald McCoy, Professor of History at Emporia State University, has lamented "the wholesale defacement of many pieces of art as

Continued on Next Page

Justice Brennan downplayed the significance of the ban on sale of these items and tried to identify some residual value they might have:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of

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Footnote 8 Continued

feathers are stripped away prior to sale." Ronald McCoy, *Legal Briefs: Feathers*, 16 Am. Indian Art Mag. 20 (No. 3, Summer 1991).

The Appendix includes a letter which illustrates the difficult quandary facing those who inherit historically significant feathered Indian artifacts. Members of the Fraser Douglass family in Cincinnati inherited two Cheyenne Indian shields containing golden eagle feathers. The shields had been part of the studio collection of the western American artist, Henry Farny, who died in 1916. One of the shields is prominent in a Farny painting at the Amon Carter Museum in Fort Worth, Texas. Because of the Eagle Protection Act, the Fraser Douglass family cannot sell the shields without destroying the integrity of these historically significant pieces. As their attorney writes:

> The Douglass family is representative of people in this country who, on working people's earnings, collected and cared for objects like these without realizing the part they were playing in preserving these for all of us for all time. The vision of a Northern Cheyenne Indian warrior making a shield of buffalo hide, natural paint and eagle feathers, to aid him in resisting the westward expansion of the 19th century while defending his homeland against overwhelming and decimating odds defines the American spirit of which we are all so proud. Now, notwithstanding the historical and symbolic importance of these shields, they cannot be legally sold by families in legal possession of them, even though the objects predate every applicable law by decades.

Letter from W. Roger Fry to Robert T. Haar 2 (March 19, 2002) (App. A-75).

> disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.... In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Allard, 444 U.S. at 65-66.

Justice Brennan speculated that the owners might not have lost all economic benefit of their investment in the artifacts because "they might exhibit the artifacts for an admissions charge." *Id.* at 66.[9] Justice Brennan then suggested that even if the owners lost all economic benefit, it did not matter. "[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim." *Id.*

In the years since *Allard*, this Court has rejected this notion that the destruction of one "strand" of a bundle of rights is insufficient to constitute a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court held that the loss of one strand – the ability to devise or pass by intestate succession even nominal interests in real property – was a compensable taking under the Fifth Amendment. In holding a section of the Indian Land Consolidation Act of 1983 unconstitutional, this Court in an opinion by Justice O'Connor, observed:

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[9]As Professor Jones has pointed out, "[T]he availability of profits from display was a fiction fabricated by the Government; all the evidence of record established that the artifacts were without value absent the ability to sell." Jones, *supra* note 2, at 68.

> The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property.... Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. **But cf. *Andrus v. Allard*, 444 U.S. 51 (1979) (upholding abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme).**

Irving, 481 U.S. at 716-17 (emphasis added).

This extraordinary inclusion in an opinion of this Court of a "But cf." cite to a prior holding of the Court appears to be a frank acknowledgement of the inconsistency between *Hodel v. Irving* and *Allard*. That inconsistency was effectively conceded by three members of the *Irving* majority. Justice Scalia, in a concurring opinion joined by the Chief Justice and Justice Powell, stated:

> [T]he present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus v. Allard*, 444 U.S. 51 (1979). Because that comparison is determinative of whether there has been a taking . . . in finding a taking today our decision effectively limits *Allard* to its facts.

Irving, 481 U.S. at 719. Commentators have also noted

that there is no logical way to reconcile the holdings in *Allard* and *Irving*.[10] Short of direct appropriation, there is no greater burden that the government can place on property than prohibiting its transfer for value.[11] This tension between *Allard* and *Irving* was exacerbated a few Terms ago when the logic of *Irving* was reprised in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

The loss imposed on owners of antique Indian artifacts is certainly more than "de minimis," *Irving*, 481 U.S. at 717 or "palpable," *Youpee*, 519 U.S. at 244. The items of personal property that Kornwolf was prosecuted for selling are substantially more valuable than the interests in allotted land at issue in *Irving* and *Youpee*, which ranged from $100 to $2700. *Irving*, 481 U.S. at 709-10; *Youpee*, 519 U.S. at 243. Also the property owners in *Irving* and *Youpee* retained full beneficial use of the property during their lifetimes as well as the right to sell or otherwise convey it *inter vivos*. *Irving*, 481 U.S. at 714-15.

"The right of sale is part (perhaps the most valuable

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[10]*See, e.g.*, Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum.L.Rev. 1630, 1663 (1988) (holding in *Irving* leaves "*Andrus v. Allard* dangling in the wind"); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L.Rev. 591, 592 (1998) ("how is one to understand a doctrine... that protects the right to bequeath property but not the right to sell property").

[11]*See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033-34 (1992) (Kennedy, J., concurring in the judgment) (a finding of "valueless" "appears to presume that the property has no significant market value or resale potential").

part) of the right of disposition." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 76 (1985). As Professor Jed Rubenfeld of the Yale Law School has observed, "According to what criteria could the Court plausibly decide that the right to bequeath property is fundamental, but that the right to sell it is not?" Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1105 (1993). This inexplicable dichotomy has led lower courts to conclude that the right to dispose of property by sale is not a fundamental aspect of property ownership under the Fifth Amendment, even though in *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), the Court described the right to dispose of a thing as inherent in the concept of property.[12]

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[12]In *Manufactured Housing Communities of Washington v. State*, 142 Wash.2d 347, 13 P.3d 183 (Wash. 2000), the Washington Supreme Court held unconstitutional under the takings clause of its state constitution a statute that required owners of mobile home parks to give to tenants a right of first refusal to buy the park. Washington's highest court concluded that the "ability to sell and transfer property is a fundamental aspect of property ownership." *Id.* at 368, 13 P.3d at 193. In basing its decision on the state constitution, the Washington Supreme Court departed from a long history of holding that the takings clauses of the state constitution and the Fifth Amendment were coextensive. It is apparent from the dissent in *Manufactured Housing Communities* that this departure was prompted by *Allard*. Noting that the regulatory burden was much more onerous on the artifact owners in *Allard*, who lost their right to sell, than the mobile home park owners, who only had to afford a right of first refusal, the dissent relied heavily on *Allard*. The dissent argued that the U.S. Supreme Court "has never accorded 'essential' status to the fundamental attribute of property asserted in this case, the right to dispose of property." *Id.* at 418-19, 13 P.3d at 219-20 (Talmadge, J., dissenting). In *Greenfield Country Estates Tenants Association, Inc. v. Deep*, 423 Mass. 81, 666 N.E.2d 988 (Mass. 1996), the Supreme Judicial Court of Massachusetts found a similar mobile home statute constitutional in reliance on *Allard*.

III

The Destruction of All Economically Beneficial or Productive Use of Antique Feathered Indian Artifacts Is a Taking Under the Logic of *Lucas v. South Carolina Coastal Council*

Allard's anomalous status in this Court's jurisprudence is most dramatically demonstrated by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There this Court held, in the land-use context, that if a regulation eliminates all economically beneficial or productive use of property, there is a categorical taking regardless of the societal benefits that may flow from the regulation and regardless of the other property rights the owner may have retained. *Id.* at 1026-29. The only qualification to this rule is where there are limitations on the use of property that "inhere in the title itself" or in "background principles of the State's law of property and nuisance." *Id.* at 1029. That the owner can continue to possess and enjoy the property, devise and donate it, and even sell it, does not matter for Fifth Amendment "takings" purposes where all economically beneficial use is prohibited.

Certainly Kornwolf has been denied all "economically beneficial use" of the Native American headdress and Sioux dance shield. In its arguments before the court of appeals, the government conceded that not only the effect, but the intent of the ban on sale of golden eagle feathers was to "destroy the market" for those items. Govt. Brief at 16. Logically, if the market for an item is destroyed, so is its economic value. As Professor William K. Jones of the Columbia Law School noted in his discussion of *Allard*:

> Avian artifacts antedating the protective legislation were not contraband, akin to alcoholic beverages following prohibition legislation; the continued possession, display, and transfer of such artifacts contravened no social norm, old or new. Further, the regulations at issue completely destroyed the commercial value of such artifacts. What cannot be sold cannot possess a market value; there is no market.

Jones, *supra*, at 68.

The *Lucas* Court attempted to address this tension between *Lucas* and *Allard* in dicta. Unfortunately, that dicta has further confused takings analysis in the lower courts. *Lucas* was a real property case; it involved an environmental restriction that prevented the owner from building single family homes on his beachfront property. *Lucas*, 505 U.S. at 1006-07. The *Lucas* Court in dicta distinguished personal property from real property by stating that by reason of the State's traditionally high degree of control over commercial dealings, the owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.* at 1027-28. In this context the Court cited *Allard*, implicitly recognizing that the effect of the prohibition on sale of bird parts lawfully obtained destroyed the economic value of antique artifacts.

This distinction between real and personal property finds no support in the text or history of the Fifth Amendment. Its author, James Madison, believed that "private property" included "merchandize" as well as land. 14 James Madison, *The Papers of James Madison*

266 (R.Rutland & T. Mason eds. 1983) (essay entitled "Property"). *See generally* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 712 (1985).

Moreover, there is no reason Kornwolf should have been aware prior to 1962 "of the possibility that new regulation might even render his property economically worthless." As this Court has itself observed:

> The Eagle Protection Act was originally passed in 1940.... Its prohibitions related only to bald eagles; it cast no shadow on hunting of the more plentiful golden eagle.

United States v. Dion, 476 U.S. 734, 740-41 (1986). There was much more reason for Lucas to anticipate in the 1980s that his beachfront property would be subject to future regulation to preserve wetlands and to prevent overdevelopment of South Carolina's coastline than for Kornwolf to believe that the government would ban the sale of an innocuous, antique Indian headdress or shield.[13]

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[13]Indeed, the South Carolina Coastal Council argued in *Lucas* that Lucas' position was very similar to that of the property owners in *Allard*. It pointed out that the Indian artifact dealers faced "a diminution in value and loss of the use in *Allard* at least as significant from a percentage standpoint as in the present case." Respondent's Brief on the Merits at 48 n.41, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Professor Rubenfeld has commented:

> But why, we might want to know, does the category of "the State's traditionally high degree of control over commercial dealings" extend to modern species-preservation laws if it

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Despite this Court's *Lucas* dicta, most lower courts that have confronted the question have concluded that per se takings rules, including that articulated in *Lucas*, are fully applicable to personal property. *See, e.g., Nixon v. United States*, 978 F.2d 1269, 1284-87 (D.C.Cir. 1992); *Maritrans Inc. v. United States*, 40 Fed.Cl. 790, 797-99 (1998); *Long Cove Club Associates, L.P. v. Town of Hilton Head Island*, 319 S.C. 30, 458 S.E.2d 757 (S.C.), *cert. denied*, 516 U.S. 1029 (1995). *But see Wilson v. City of Louisville*, 957 F.Supp. 948, 954-55 (W.D.Ky. 1997) (citing *Lucas* dicta for proposition "that a regulation could render personal property valueless without constituting a taking"). However, application of the per se takings rule in *Lucas* to personal property squarely conflicts with *Allard* as well as the prosecution of Kornwolf in this case.

A recent takings case illustrates the disparate treat-

Footnote 13 Continued

> does not extend to modern beachfront-preservation laws? And exactly why should the hunter of (or dealer in) eagles have been aware of the possibility that new regulation might render his property worthless? Surely not because the state exercised a "traditionally high degree of control" over the spoils of hunting in 1789. Is it because every eagle hunter or dealer today ought to know of the threat to the species and the public concern over this threat? But then shouldn't every land speculator (like Lucas) know of the threat to the beachfront or wetlands and of the public concern over this threat?

Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1152 (1993). *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan.L.Rev. 305, 330 (1997) (*Lucas* Court did not "offer support for the questionable assumption that the state has traditionally regulated personal property more than real property.")

ment. In *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36 (2001), the Court of Federal Claims held that the owner of a fishing trawler was entitled to compensation when Congress passed a law that prohibited the ship from fishing for Atlantic mackerel and herring in U.S. waters. The Court found that the legislation had "dramatically reduced" the economic value of the vessel. *Id.* at 43. The Court of Federal Claims distinguished *Allard* as a case where "'it [was] not clear that appellees [would] be unable to derive economic benefit from the artifacts.'" *Id.* at 50 (*quoting Allard*, 444 U.S. at 66). The Court of Federal Claims relied on *Lucas* and held "that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled." *Id.* at 46. The court equated "beneficial uses" with "profitable uses." *Id.* at 50. The Court of Federal Claims also observed:

> We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the "group of rights inhering in the citizen's relation to [a] physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

Id. at 47.

Like this case, *American Pelagic Fishing Co.* involved personal property. Any economic use, let alone "profitable" use, of the antique artifacts in this case has been reduced at least as dramatically as that of the vessel in

American Pelagic Fishing Co. Eagle feathers are not "inherently dangerous or a nuisance." And what this Court said in *General Motors* is that "the right to possess, use *and dispose*" of property is part of the "group of rights inhering in the citizen's relation to the physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (emphasis added). *See also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit"). Unlike Kornwolf, who could not have known at the time he obtained the Indian artifacts that they might someday be subject to a commercial ban, the owner of the fishing trawler knew at the time he obtained the ship that fishing rights were subject to federal regulation. Simple fairness dictates that whether a property owner receives a check from the government, like American Pelagic Fishing Co., or an electronic bracelet, like Kornwolf, should not turn on imaginary distinctions or mechanical application of an obsolete precedent that cannot logically be reconciled with subsequent opinions of this Court.

IV

Violation of the Takings Clause is a Defense to a Criminal Prosecution

The takings issue in this case is particularly sensitive because it arises in the context of a criminal prosecution and therefore implicates Kornwolf's liberty as well as his property interests. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re*

Winship, 397 U.S. 358, 363 (1970). A criminal statute is unconstitutional on its face or as applied where it conflicts with some guarantee of the Bill of Rights, and the unconstitutionality of the statute is a defense in a criminal prosecution.[14] A statute "cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution." *Younger v. Harris*, 401 U.S. 37, 52 (1971). Indeed, the *Allard* plaintiffs themselves had standing because they might "face future criminal prosecutions for violations of the statutes." *Allard*, 444 U.S. at 64 n. 21. *See also United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (considering Takings Clause defense to criminal conviction under Endangered Species Act). It has also long been held that where, as here, a particular application of a Congressional enactment violates the Takings Clause, that act as applied is void. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-02 (1935).[15]

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[14]*E.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (free expression); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to receive information and ideas as part of freedom of speech and the press); *Haynes v. United States*, 390 U.S. 85 (1968) (Fifth Amendment privilege against self-incrimination).

[15]It is a testament to the confusion about the Takings Clause that the Eighth Circuit could suggest that the failure of the district court to order the return of the "buy" money in this case, *i.e.*, the $7000 payment for the dance shield and the $5000 downpayment on the headdress, might have somehow compensated Kornwolf for any taking. The Eighth Circuit readily acknowledged that there had been no determination below of the value of the artifacts and, therefore, of what would constitute "just compensation." In fact, the undercover agent had agreed to pay $15,000 for the headdress before it was seized pursuant to a search warrant.

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CONCLUSION

None of the courts below disputed Kornwolf's assertion that *Andrus v. Allard* is inconsistent with subsequent opinions of this Court. They simply concluded that until this Court reconsiders *Allard*, they have no choice but to follow it. Despite this Court's opinions in *Agins* and *Nollan*, neither Kornwolf nor any other defendant prosecuted under these statutes has ever received a judicial determination that the ban on sale of antique feathered Indian artifacts with a provenance

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Footnote 15 Continued

There is a more fundamental problem with the Eighth Circuit's suggestion. It implies that any constitutional defect in this criminal prosecution is cured if the government pays the defendant for his property after conviction. This suggestion was also implicit in the Government's argument below that a criminal defendant cannot raise a Fifth Amendment takings defense to a criminal prosecution. He can only seek damages in the Court of Federal Claims.

A similar Tucker Act argument was made in *Allard* and implicitly rejected by the *Allard* Court. Brief for Appellants at 13, 33-34, *Andrus v. Allard*, 444 U.S. 51 (1979). The Court of Federal Claims can only award money damages. It has no jurisdiction to determine that a statute fails to "substantially advance" a legitimate state interest. As this Court observed in *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), an allegation that a statute does not substantially advance a legitimate state interest "does not depend on the extent to which [property owners] are deprived of the economic use of their particular pieces of property or the extent to which these particular [property owners] are compensated." Moreover, the Court of Federal Claims cannot reverse a criminal conviction, reimburse criminal fines, or restore a citizen's good name. In short, the government cannot cure a criminal statute that has the effect of unconstitutionally taking property by handing the defendant a check on the way to jail.

predating the statutory protection of the golden eagle "substantially advances" that protection. The question was not asked or answered in *Allard*.

No court has explained why Irving's ability to bequeath a $100 fractional interest in land is constitutionally protected while Kornwolf's ability to sell substantially more valuable feathered Indian artifacts is not. There is also no explanation how the government can intentionally destroy the market for, and *a fortiori* the economic value of, historically significant property yet escape the per se takings rule of *Lucas*. This lack of explanation begs the question why Kornwolf's burden is not one that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Addressing these issues in the context of this case will provide critical guidance to the lower courts and ameliorate the disparate treatment that property owners now receive there. Review by this Court may also save an important part of our history. The perverse legacy of *Allard* is that in its effort to preserve one part of this country's heritage, it has created incentives to destroy another. *See supra* note 8. While bald and golden eagles can be reclaimed through breeding,[16] there is no way to

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[16]The golden eagle, unlike the bald eagle, has never been listed as threatened or endangered under the Endangered Species Act. 16 U.S.C. §§1531, 1533 (list at 50 C.F.R. §17.11). A principal reason for protecting the golden eagle in 1962 was to give added protection to the bald eagle. During the first three years of its life, the bald eagle does not have the white head and tail of the adult and, therefore, it is difficult to distinguish from the golden eagle. As a result, bald eagles were sometimes killed by hunters seeking the golden eagle. *See* S. Rep. No.87-1986 at 1 (1962). Because of the

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regenerate authentic artifacts of this country's Native American past. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: April 11, 2002

Footnote 16 Continued

recovery of the bald eagle population, the Department of Interior has proposed removing the bald eagle entirely from the endangered species list. *See* 66 Fed. Reg. 61663, 61697 (Dec. 3, 2001).

APPENDIX
TABLE OF CONTENTS

Appendix A
Stay of Mandate by Court of Appeals (2-8-02) A-1

Appendix B
Court of Appeals Opinion (1-16-02) A-3

Appendix C
Stay Order of District Court (6-5-01) A-10

Appendix D
District Court Judgment in a Criminal Case (5-29-01) A-12

Appendix E
District Court Order (10-30-00) A-25

Appendix F
District Court Order (9-22-00) A-29

Appendix G
Magistrate Report and Recommendation (10-16-00) A-32

Appendix H
Magistrate Report and Recommendation (8-24-00) A-37

Appendix I
Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a) A-45

Appendix J
Migratory Bird Treaty Act, 16 U.S.C. §§703 & 707(b) A-46

Appendix K
Fish and Wildlife Service Regulation, 50 C.F.R. §22.2(a)(1)-(2) (1999) A-47

Appendix L
Superseding Indictment (9-7-00) A-48

Appendix M
Indictment (7-7-00) A-53

Appendix N
Kornwolf Affidavit of 9-21-00 (filed 10-6-00) A-56

Appendix O
Kornwolf Affidavit of 8-16-00 (filed 8-16-00) A-61

Appendix P
Plea Agreement and Sentencing Stipulations (10-31-00) A-65

Appendix Q
Government Exhibit #l (color photo of shield) A-72

Appendix R
Government Exhibit #2 (color photo of headdress) A-73

Appendix S
Fry Letter to Haar (3-19-02) A-74

APPENDIX A

COURT OF APPEALS ORDER STAYING MANDATE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 1-2394MNST

UNITED STATES OF AMERICA,

Appellee,

vs.

TIMOTHY PATRICK KORNWOLF,

Appellant.

Appeal from the
United States District Court
for the District of Minnesota

Appellant Kornwolf's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 5/9/02. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court. (5362-010199)

February 8, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals
Eighth Circuit

APPENDIX B

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant-Appellant.

Appeal from the
United States District Court
for the District of Minnesota.

Submitted: November 12, 2001

Filed: January 16, 2002 (Corrected 3/4/02)

(Corrected 4/3/02)

Before LOKEN, LAY, and HEANEY, Circuit Judges.

LAY, Circuit Judge.

Timothy P. Kornwolf pled guilty to violating the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a), and the Migratory Bird Treaty Act, 16 U.S.C. § 703, by attempting to sell two Native American artifacts containing eagle feathers. Kornwolf entered a conditional plea of guilty to four counts of the indictment, reserving the right to withdraw the plea if, on appeal, the acts were found unconstitutional as applied to Kornwolf. At sentencing, the Government asked the district court[1] for an order requiring Kornwolf to return the $12,000 paid to him for the artifacts. The district court refused to issue such an order. Kornwolf has appealed the district court's holding that the acts do not cause an unconstitutional taking of his property.[2] We affirm.

Facts

Kornwolf owned an American Indian headdress and Sioux dance shield. Both of the artifacts contain golden eagle feathers. Kornwolf came into possession of the artifacts through his great uncle before October 24, 1962, the effective date of the Bald and Golden Eagle Protection Act.[3] A regulation, authorized by the Migra-

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[1]The Honorable David S. Doty, United States District Judge for the District of Minnesota, presiding.

[2] Kornwolf was sentenced to three years probation with a special condition that he participate for a period of 180 days in a home detention program, which may include electronic monitoring, a fine of $2000 and a special assessment of $400. The district court stayed Kornwolf's sentence pending this appeal.

[3]"Whoever ... shall knowingly ... take, possess, sell, purchase, barter, offer to sell ... any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part ... shall be fined not more than $5,000 or imprisoned not more than one year or both. . . ." 16 U.S.C. § 668(a).

tory Bird Treaty Act, became effective after the Bald and Golden Eagle Protection Act. *See* 50 C.F.R. §§ 22.1, 22.2(a)(1)-(2) (2001).[4] Under the acts, it is unlawful to sell or attempt to sell eagle feathers even though they were lawfully acquired prior to the effective dates of the acts.

On November 1, 1999, Kornwolf sold the dance shield for $7000 to an undercover Norwegian law enforcement officer working with the United States Fish and Wildlife Service. Later, the undercover agent made two wire transfers to Kornwolf for the headdress totaling $5000. The headdress was later seized pursuant to a search warrant on January 19, 2000.

Analysis

This case, at least on its face, is strikingly similar to *Andrus v. Allard*, 444 U.S. 51 (1979). In *Allard*, the Supreme Court upheld the constitutionality of the Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act against a Fifth Amendment takings claim. Kornwolf contends this case is not governed by *Allard* because the recent takings cases "demonstrate both a greater solicitude to the burdens placed on property owners by governmental regulations and less willingness to assume a justifying nexus between those burdens and public purpose."

The Supreme Court has stated, "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which

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4"The import, export, purchase, sale, trade, or barter of bald and golden eagles, or their parts, nests, or eggs is prohibited." 50 C.F.R. § 22.1 (2001).

directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Our court has adhered to this directive. *See, e.g., United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001); *United States v. Maynie*, 257 F.3d 908, 918 (8th Cir. 2001); *see also United States v. Singletary*, 268 F.3d 196, 205 (3rd Cir. 2001); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 13 (1 st Cir. 1998). Thus, the issue is whether *Allard* is directly controlling. *See Agostini*, 521 U.S. at 237.

The facts of the present case essentially mirror *Allard*. Kornwolf asserts one crucial factual distinction: *Allard* did not directly address feathers owned by an individual prior to the effective dates of the acts. However, in *Allard*, the Court's ruling extends to include feathers acquired prior to the passing of the Bald and Golden Eagle Protection Act:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Allard, 444 U.S. at 58. This rationale also applies to the Migratory Bird Act, thereby enabling the ban of "commercial transactions in covered bird parts in spite of the fact that the parts were lawfully taken before the onset of federal protection." *Id.* at 63. Therefore, the Court's holding in *Allard*, "that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment," *id.* at 67-68, encompasses bird feathers acquired prior to the effective date of the acts, even though not directly addressed.

Kornwolf also attempts to distinguish this case from *Allard* on procedural grounds. Kornwolf argues the difference between the facial challenge in *Allard* and Kornwolf s as applied challenge removes the present dispute from the rubric of *Allard*. The first alleged distinguishing characteristic is the provenance of the feathers; the artifacts, which contain eagle feathers, were acquired prior to the effective dates of the acts. As earlier demonstrated, the provenance of the artifact does not remove the present case from the confines of the ruling. *See id.*

The second alleged distinguishing characteristic is the value of the feathers. As demonstrated by *Allard*, the value is immaterial. *See id.* ("[T]he simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment."). However, if a court were to examine the value of the feathers, which the lower court did not, it would only lend further credence to the constitutional finding. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (stating that if just compensation is received then no claim exists against the Government); *Ruckelshaus*

v. Monsanto Co., 467 U.S. 986, 1013 (1984) (stating if just compensation were to be received, "then Monsanto would have no claim against the Government for a taking"). Although the reasonable value of the artifacts with and without the feathers has not been established, Kornwolf did receive compensation. *See, e.g., Farmland Pres. Ass'n v. Goldschmidt*, 611 F.2d 233, 237-38 (8th Cir. 1979); *United States v. 91.90 Acres of Land, Situated in Monroe County, Mo.*, 586 F.2d 79, 86 (8th Cir. 1978). Kornwolf was paid $7000 for the dance shield and $5000 for the headdress. The district court refused to order Kornwolf to disgorge the $12,000. If a court were to examine the value of the artifacts, it would be an exercise in determining whether additional compensation, beyond the $12,000, was required in order to suffice as "just compensation." Thus, instead of removing the case from the control of *Allard*, Kornwolf's receipt of compensation for the artifacts dictates it is more likely not to be deemed a taking without just compensation. *See Allard*, 444 U.S. at 67 (awarding no compensation); *Williamson County,* 473 U.S. at 194; *Monsanto*, 467 U.S. at 1013.

Kornwolf's last alleged distinguishing characteristic is that the asserted claim is in defense to criminal prosecution.[5] Although *Allard* did not involve criminal prosecution, it did address the constitutionality of statutes that prohibited enumerated actions and even noted the prior criminal conviction of one of the appellees under the Bald and Golden Eagle Protection Act. *Allard*, 444 U.S. at 54 n.2. Therefore, the Court clearly envisioned the acts' enforcement within a criminal context.

[5]The parties have neither cited any authority, nor has any been found, that applies the takings clause as a defense to criminal prosecution.

Furthermore, analyzing this allegedly distinguishing fact in light of the test for takings illustrates it is a difference without a distinction. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (stating the factors in determining a taking are the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectation, and the character of the government regulation with regard to whether the invasion is physical or a necessary readjustment of economic benefits and burdens).

Conclusion

Because *Allard* is directly controlling, this court need not examine the present case in light of recent takings cases.

Judgment AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

STAY ORDER OF DISTRICT COURT

[Stamped "FILED JUN 05 2001
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ leg
(attys, PO, USM)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant.

ORDER

This matter is before the court on defendant's motion pursuant to Fed. R. Crim. P 58(g)(3) and 18 U.S.C. §3143(b)(1) to stay his sentence pending appeal. Defendant pleaded guilty in this case on October 31, 2000, and was sentenced on May 29, 2001, to a three-year term of probation, including 180 days of home detention. Defendant's plea agreement clearly sets forth his intent to appeal his conviction. The subject of the appeal raises a substantial question of law, therefore the court does not believe that appeal is made only for the purpose of delay. Further, the court finds that defendant is not likely to flee nor does he pose a danger to the community.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to stay his sentence pending appeal is granted.

2. Defendant shall remain on bond pending appeal, subject to the same conditions set forth in his original bond.

Dated: June 4. 2001

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX D

DISTRICT COURT JUDGMENT

[Stamped "FILED MAY 29, 2001
Francis E. Dosal, Clerk
Judgment Entd _____
Deputy Clerk /s/ PS
(dist'd)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

TIMOTHY PATRICK KORNWOLF

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After
November 1, 1987)

CASE NUMBER:
00-199(1)(DSD/JMM)

ROBERT D. MILLER
Defendant's Attorney

THE DEFENDANT:

[x] pleaded

guilty to counts:

1, 2, 3, 4 of the Superseding Indictment.

Accordingly, the defendant is adjudged guilty of such counts, which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Special Assessment Amount $ 400.00 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **391-44-0641**

Defendant's Date of Birth: **02/22/1946**

Defendant's USM No.: **09531-041**

Defendant's Residence Address:

1306 Third Street South
Stillwater, MN 55082

Defendant's Mailing Address:

May 29, 2001
Date of Imposition of Judgment

/s/ David S. Doty
Signature of Judicial Officer

DAVID S. DOTY, Senior United States District Judge
Name & Title of Judicial Officer

May 29, 2001
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
16 USC § 668	Selling a Sioux Dance Shield Containing Golden Eagle feathers and offering to sell a headdress containing Golden Eagle feathers	11/01/1999	1
16 USC § 703	Selling a Sioux Dance Shield Containing Golden Eagle feathers and offering to sell a headdress containing Golden Eagle feathers	11/01/1999	2
16 USC § 668	Selling a headdress containing Golden Eagle feathers	11/25/1999	3
16 USC § 703	Selling a headdress containing Golden Eagle feathers	11/25/1999	4

PROBATION

The defendant is hereby placed on probation for a term of 3 years on each of Counts 1 through 4, to be served concurrently.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated

below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit home [*sic*: him] or her at an [*sic*: any] time a [*sic*: at] home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

2. The defendant shall participate for a period of 180 days in a home detention program which may include electronic monitoring. The defendant is ordered to pay for the costs of the electronic monitoring.

3. Because the instant offense is not drug-related and the defendant does not have a history of drug abuse, the defendant is not required to undergo manda-

tory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Fine	Restitution
Totals:	$ 10,000.00	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .....$_____

FINE

The above fine includes costs of incarceration and/or supervision, including electronic monitoring, in the amount of $ 8,000.00.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[x] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[x] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court modifies or waives interest on restitution as follows:

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of pymnt
	TOTALS:	$____	$____

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] special assessment in full immediately.

B [x] $ 2,000.00 of fine immediately, balance due (in accordance with E).

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [x] in equal, monthly installments of $222.22 over a period of 3 years to commence immediately.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[x] The defendant shall forfeit the defendant's interest in the following property to the United States:

Pursuant to the plea agreement, the government has agreed not to dispose of the evidence that was seized during the investigation. If defendant prevails on his appeal of the constitutionality of the statute, then the evidence that was seized will be returned to defendant, and defendant shall pay to the government the sum of $12,000. If the appeal is unsuccessful, then the government will retain possession of the evidence and defendant will have no ownership interest in the evidence that was seized.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer, or the United States Attorney.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

see attachment

Guideline Range Determined by the Court:

Total Offense Level: 9

Criminal History Category: II

Imprisonment Range: 6 to 12 months

Supervised Release Range: 1 year

Fine Range: $ 1,000 to $ 10,000

[ ] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $___

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of

a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

FINDINGS OF FACT

The court adopts the factual statements contained in the presentence investigation report as to which there is no objection, and, as to the controverted factual statements, resolves the objections as follows:

Paragraph 2: Defendant contends the PSR should be amended to reflect his constitutional challenge to the statutes under which he has been convicted. The references to defendant's unsuccessful pre-trial motions are irrelevant to sentencing therefore properly excluded.

Paragraphs 4-12: Defendant also contends that information in the PSR regarding James O'Donnell's prosecution on similar charges in South Dakota and O'Donnell's assertions that defendant has trafficked other illegal artifacts should be excluded as irrelevant to this case. Based on the agreement of the parties as to the PSR, the court finds by a preponderance of the evidence that defendant has sold not only the two family heirlooms involved in the counts of conviction, but also other Native American artifacts containing golden eagle feathers.

Paragraphs 13-16: Defendant claims that the description of the sale of artifacts to Ivar Husby is generally

incomplete and should be modified to include additional information. He also denies that he told Husby not to tell anyone who sold him the Native American dance shield. This factual dispute need not be resolved by the court because the disputed matters will have no impact on sentencing.

GUIDELINE CALCULATIONS

The parties have no objections to the guideline calculations contained in the PSR, however, the court notes that the defendant's offense level is enhanced by a $22,000 valuation ($15,000 headdress, $7,000 shield) which includes not only the value of the illegal eagle feathers but also the value of the headdress and dance shield. The court believes that defendant should be penalized only for the value of the eagle feathers, however, separating their value from the overall value of the artifacts is difficult. Some valuation enhancement is clearly appropriate, given that illegal feathers add considerable value to a Native American artifact. For example, in the case of the headdress, information previously submitted by the defendant (McCormick Aff., ¶ 4-5) indicates that the feathers appear to have enhanced the value of the headdress by at least $8,000. Assuming a similar increase in value with the dance shield, the court believes valuing the eagle feathers in excess of $10,000 but less than $20,000 is reasonable. *See* U.S.S.G. § 2Fl.1, commentary ("The district court need only made a reasonable estimate of the range of loss given the available information.") For these reasons, the court will lower defendant's valuation enhancement from 4 levels to 3 levels. U.S.S.G. § 2Fl.1(b)(1)(D) and (E).

Defendant moves for a downward departure under

guideline section 4A1.3, arguing that his criminal history points over represent the seriousness of his past conduct. In deciding whether a departure under Section 4A1.3 is justified, the court considers the historical facts of the defendant's criminal career. *See United States v. Senior*, 935 F.2d 149, 151 (8th Cir. 1991); *United States v. Smith*, 909 F.2d 1164, 1169-70 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991); U.S.S.G. § 4A1.3(a)-(e).

The court has reviewed defendant's criminal history and concludes that a departure under Section 4A1.3 is not warranted. While the court agrees that the insufficient funds charge is a minor offense, the two drinking and driving offenses are serious charges which together properly place defendant in a criminal history category II. Defendant suggests that one of these convictions is a "borderline" case, but as the government correctly notes, the defendant presents no constitutional or federal statutory argument which would permit this collateral challenge to a prior conviction and sentence. Accordingly, defendant's downward departure on this basis is denied.

Defendant also contends that a departure under *Koon v. United States*, 518 U.S. 81 (1996), is warranted. A departure under *Soon* [*sic*: *Koon*] is reserved for those rare cases that stand outside of the heartland of cases contemplated by the Sentencing Commission when it formulated the sentencing guidelines. Defendant argues that this is just such a case because the wildlife offense guidelines do not contemplate defendant's sale of two family heirlooms, for which no contemporary golden eagles were killed. Defendant's argument that the heartland of cases involves only "live or recently-killed birds" is without merit, as the court clearly

indicated during defendant's constitutional challenges to the statute of conviction. The government has established that defendant's dealings in illegal artifacts is not limited to the sale of the headdress and dance shield to Ivar Husby. Accordingly, this basis for departure is denied.

APPENDIX E

ORDER OF DISTRICT COURT DENYING DEFENDANT'S MOTION TO DISMISS COUNTS 1-4 OF SUPERSEDING INDICTMENT

[Stamped "FILED OCT 30 2000
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

ORDER

This matter is before the court on defendant's objections to Magistrate Judge John M. Mason's report and recommendation dated October 16, 2000. In his report, the magistrate judge recommended that defendant's motion to dismiss Counts 1, 2, 3 and 4 the indictment [Doc. No. 35] be denied.[1] Defendant objects, contending that the statutes under which he is charged, 16 U.S.C. § 668(a), the Bald and Golden Eagle Protection Act, and 16 U.S.C. § 703, the Migratory Bird Treaty Act, are unconstitutional as applied.

Defendant is charged with attempting to sell various Native American artifacts containing eagle feathers and scissortail flycatcher feathers, in violation of federal laws designed to protect those birds. Defendant argues that two of the artifacts, a Plains Indian headdress and Sioux Indian dance shield, both of which contain golden eagle feathers, have been in the possession of his family since before the passage of the statutes under which he is charged. Defendant argues the federal laws which criminalize the sale of Native American artifacts are unconstitutional as applied to his attempts to sell these artifacts.

Defendant has previously argued to this court that the Bald and Golden Eagle Protection Act is unconstitutional as applied. In a prior motion to dismiss, defendant

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[1] The magistrate judge also recommended that: (1) the government's motion to dismiss Counts 5, 6, 7 and 8 [Doc. No. 46] be granted, and (2) defendant's motion to dismiss Counts 5 and 6 [Doc. No. 31], motion to strike words from Counts 5 and 6 [Doc. No. 32] and motion to strike references to headdress from Counts 5 and 6 [Doc. No. 34] be denied as moot. Defendant concurs with the recommendation as to the government's motion to dismiss Counts 5, 6, 7 and 8, and concurs that the dismissal of those counts renders his motions as to Counts 5 and 6 moot.

argued to the magistrate judge that the Act exceeded Congress' authority under the Commerce Clause. In his later objections to the magistrate judge's report, defendant also argued that the Act violated the Just Compensation Clause of the Fifth Amendment. This court disagreed with defendant that the Act was unconstitutional on either basis, and in its order adopting the magistrate judge's recommendation, the court emphasized to defendant that the United States Supreme Court has clearly rejected Fifth Amendment challenges to the Act. *See Andrus v. Allard*, 444 U.S. 51 (1979).

Defendant now brings a duplicative motion to dismiss the counts associated with the headdress and shield, arguing that the statutes as applied here authorize a governmental taking without compensation. This court's ruling on the prior motion to dismiss and the magistrate judge's recommendation on the current motion to dismiss make it clear that unless the Supreme Court overrules *Allard*, the congressional prohibition on the sale of *all* eagle feathers stands as a lawful means to protect and preserve threatened and endangered bird species. Therefore, defendant's motion to dismiss Counts 1, 2, 3 and 4 of the superseding indictment is properly denied.[2]

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[2] Defendant asserts in the alternative that this court should recognize the age of the feathers as an affirmative defense and give the jury an instruction to that effect. Objections to a report and recommendation are not the appropriate forum for submitting proposed jury instructions. Defendant should raise this issue in his proposed instructions to the court, which the court will review with the parties during the regularly scheduled jury charge conference.

After conducting a *de novo* review of the file and record, the court adopts the magistrate judge's report and recommendation. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to dismiss Counts 1, 2, 3 and 4 of the superseding indictment [Doc. No. 35] is denied.

2. The government's motion to dismiss Counts 5, 6, 7 and 8 of the superseding indictment [Doc. No. 46] is granted.

3. Defendant's motion to dismiss Counts 5 and 6 [Doc. No. 31], motion to strike words from Counts 5 and 6 [Doc. No. 32] and motion to strike references to headdress from Counts 5 and 6 [Doc. No. 34] are denied as moot.

Dated: October 30, 2000

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX F

ORDER OF DISTRICT COURT DENYING DEFENDANT'S MOTION TO DISMISS ORIGINAL INDICTMENT

[Stamped "FILED SEP 22, 2000
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ mf
(Attys)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant.

ORDER

This matter is before the court on defendant's objections to Magistrate Judge John M. Mason's report and recommendation dated August 23, 2000. In his report, the magistrate judge recommended that defendant's motion to dismiss the indictment [Doc. No. 14] be denied. Defendant objects, contending that the statute under which he is indicted, 16 U.S.C. § 668(a), the "Bald and Golden Eagle Protection Act," is unconstitutional as applied.[1] Specifically, defendant asserts that prohibiting the sale of an Indian headdress and shield which were allegedly in the possession of defendant's family prior to the enactment of the Golden Eagle Protection Act violates the Just Compensation Clause of the Fifth Amendment.

As the magistrate judge's report fully discussed, the United States Supreme Court has previously rejected a Fifth Amendment challenge to the Act. *See Andrus v. Allard*, 444 U.S. 51 (1979). The court understands that in *Allard*, no assertion was made that any of the artifacts were acquired prior to 1962, the year that Congress amended the Bald Eagle Protection Act to include golden eagles. However, the court disagrees with defendant that *Allard* does not apply where pre-Act chain of custody might be established. The Court found in *Allard*:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Con-

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[1] Subsequent to oral argument on this motion, the government obtained a superceding [*sic*: superseding] indictment which contains additional charges under the Migratory Bird Treaty Act.

> gress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because *there is no sure means by which to determine the age of [illegible]d feathers; feathers recently taken can easily be passed off as having been obtained long ago.*

Id. at 58-59 (emphasis added). As the Court's discussion indicates, only through a complete prohibition of the sale of bird feathers can the Act achieve its stated goals. Therefore, defendant's motion to dismiss the indictment is properly denied.

After conducting a *de novo* review of the file and record, the court adopts the magistrate judge's report and recommendation. Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to dismiss the indictment [Doc. No. 14] is denied.

Dated: September 22, 2000

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX G

REPORT AND RECOMMENDATION OF MAGISTRATE RECOMMENDING DENIAL OF DEFENDANT'S MOTION TO DISMISS COUNTS 1-4 OF SUPERSEDING INDICTMENT

[Stamped "FILED OCT 16 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD ____
DEPUTY CLERK /s/ leg"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned on October 10, 2000 upon Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34], and Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35]. Assistant United States Attorney Clifford Wardlaw appeared on behalf of Plaintiff; Robert Miller, Esq. appeared on behalf of Defendant. On October 13, 2000, the Government filed a Motion to Dismiss Counts 5, 6, 7, and 8. The matter has been referred to the undersigned by Judge David S. Doty for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Upon the following Findings of Fact/Report, it is recommended that (1) the Government's Motion to Dismiss Counts 5, 6, 7, and 8 be granted; (2) Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], and Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34] be denied as moot; and (3) Defendant's Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35] be denied.

FINDINGS OF FACT/REPORT

Defendant is charged with violating provisions of the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a), and the Migratory Bird Treaty Act, 16 U.S.C. §703. Defendant moves to dismiss Counts 1-4 of the Superceding [*sic*: Superseding] Indictment on the grounds that these statutes are unconstitutional as they are being applied in this case, because they violate the Just

Compensation Clause of the Fifth Amendment to the U.S. Constitution.

Defendant made a similar argument in his Motion to Dismiss the claims against him under the original Indictment. The arguments in the prior motion were based on Defendant's assertion that the Bald and Golden Eagle Protection Act exceeded Congress's Commerce Clause power. We recommended denial of the Motion [Docket No. 22], and the District Judge issued an Order to that effect [Docket No. 29].

In the instant Motion, Defendant argues that the statutes authorize a governmental taking without just compensation, because parties who acquired eagle feathers prior to the enactment of the statutes are prohibited from selling those feathers. Defendant recognizes that the Supreme Court has previously decided this issue, and held that denial of the right to sell feathers acquired prior to the enactment of the statutes is not a taking in terms of the Just Compensation Clause. *Andrus v. Allard*, 444 U.S. 51, 58-59 (1979) (cited in Defendant's Memorandum in Support of Motion to Dismiss at p. 5). He asks us to find otherwise, based upon an analysis of Supreme Court cases dealing with property rights that have been decided since *Andrus*.

The Supreme Court has repeatedly held that if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in another line of Supreme Court decisions, the lower courts must follow the case which directly controls, leaving the Supreme Court to overrule its own decision if it so chooses. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson / American Express, Inc.*, 490 U.S. 477, 484 (1989). This principle is directly applicable in

the instant case. It is up to the Supreme Court to overrule *Andrus* if such action is appropriate, not this Court. For now, we are bound to follow Supreme Court precedent, which clearly holds that the statutes under which Defendant is charged do not constitute a taking for purposes of the Constitution.

RECOMMENDATION

For the reasons set forth above, it is recommended that (1) the Government's Motion to Dismiss Counts 5, 6, 7, and 8 be granted; (2) Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], and Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34] be denied as moot; and (3) Defendant's Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35] be denied.

Dated: October 16, 2000

/s/ John M. Mason

JOHN M MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before **October 30, 2000** a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before **October 30, 2000**.

APPENDIX H

REPORT AND RECOMMENDATION OF MAGISTRATE RECOMMENDING DENIAL OF DEFENDANT'S MOTION TO DISMISS ORIGINAL INDICTMENT

[Stamped "FILED AUG 24 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA
Plaintiff,

v.

TIMOTHY KORNWOLF,
Defendant.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned on August 14, 2000 upon Defendant's Motions to Suppress Statements, Admissions and Answers [Docket No. 11]; to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 12]; and to Dismiss Indictment [Docket No. 14].[1] Assistant United States Attorney Clifford B. Wardlaw appeared on behalf of Plaintiff; Robert D. Miller, Esq. appeared on behalf of Defendant. At the hearing, Defendant withdrew his Motions to Suppress Statements, Admissions and Answers [Docket No. 11], and to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 12], as moot. The matter was referred to the undersigned by Judge David S. Doty for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Upon the following Findings of Fact/Report, it is recommended that Defendant's Motion to Dismiss Indictment [Docket No. 14] be denied.

FINDINGS OF FACT/REPORT

Defendant has been charged with four counts of violating the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. Defendant moves to dismiss the Indictment against him on the basis that 16 U.S.C. § 688 is unconstitutional.

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[1] Defendant's Motions to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant [Docket No. 8]; for Disclosure of 404 Evidence [Docket No. 9]; to Disclose and Make Informant Available for Interview [Docket No 10]; for List of Government Witnesses [Docket No. 13]; for Evidentiary Hearing [Docket No. 15]; and for Continuance [Docket No. 16] are resolved in a separately issued Order.

I. BALD AND GOLDEN EAGLE PROTECTION ACT

16 U.S.C. § 688(a) [*sic*: § 668(a)] provides, in relevant part:

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided* . . . That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.[2]

Congress's stated purpose for enacting the Bald and Golden Eagle Protection Act (the "Act") was to protect eagles from extinction. Bald Eagle Protection Act, ch.

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[2] Protections for the golden eagle were added through Pub. L. 87-884 as part of a 1962 amendment to the statute.

278, § 1, 54 Stat. 250 (1940).

Defendant concedes that Congress had the authority to enact a statute prohibiting the sale of newly gathered eagle feathers in order to protect eagles from extinction. However, Defendant argues that the eagle feathers bought and sold by him were originally gathered "before the prohibition of their trade." Def. Memo. p. 3. Defendant would have us find that the basis for the statute put forth by Congress, *i.e.* preventing the extinction of golden and bald eagles, does not provide a constitutional basis for the statute as applied in this case.

In response, the Government argues that 16 U.S.C. § 668(a) is a constitutional exercise of Congress's authority to regulate interstate commerce. See U.S. Const., Art. I, § 8, cl. 3. The Government does not respond to Defendant's specific argument, but rather asserts that Congress' broad power to regulate wildlife supports the constitutionality of the Act.

At the hearing, Defendant submitted the testimony of Professor Richard Edwards, an expert in the area of Plains Indians artifacts. The Government's objection to Professor Edwards' testimony on the basis of relevance was taken under advisement by the Court. That objection is overruled.

Professor Edwards testified that virtually no market exists for golden eagle feathers because people are concerned about being prosecuted under the Act. He also testified that he knows of at least some occasions where old eagle feathers on Indian artifacts have been replaced with new eagle feathers. Professor Edwards also testified that he would not be able to tell the difference between an old (collected before the effective date of the Act) and a new eagle feather by sight, but

rather would have to rely on documentation to determine its age.

II. DISCUSSION

"The Supreme Court has identified three broad categories of activity that fall within the scope of Congress's Commerce Clause power. Congress may (1) regulate the use of the channels of interstate commerce, (2) regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) regulate activities that substantially affect interstate commerce." *United States v. Wright*, 128 F.3d 1274, 1274-75 (8th Cir. 1997) (*citing U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995)).

As the Fourth Circuit has pointed out, there appear to be no cases where any endangered species regulation, including the Act, has been invalidated for exceeding Congress's commerce clause power. *Gibbs v. Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000). For example, in *United States v. Lundquist*, 932 F.Supp. 1237 (D.Or. 1996), the court faced a challenge to the Act similar to the one advanced by Defendant. The court found defendant's argument that the effect on interstate commerce was not substantial to be lacking in merit. *Id.* at 1245. The court explained that "the possession of eagle parts is an activity which affects a broad regulatory scheme relating to commercial transactions and which, when viewed in the aggregate with similar activities nation-wide, substantially affects interstate commerce." *Id.*

The Ninth Circuit found the Act to be a valid exercise of Congress's commerce power in *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996). The court recognized that "[t]he Bald Eagle Protection Act, amended in 1962 to include golden eagles, was passed to

protect eagles from extinction." *Id.* at 1481. "Both commerce in and possession of eagle parts, each taken as a class, have substantial effects on interstate commerce, because both activities, even when conducted purely intrastate, threaten the eagle with extinction. . . . Extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." *Id.*

We agree with the reasoning of the Ninth Circuit in *Bramble*. Furthermore, we note that the distinction Defendant seeks to make between old and new eagle feathers does not change the analysis. Defendant's expert on Indian artifacts testified that he would not purchase an artifact from which the original feather had been removed, and he also testified that he would not be able to tell a new from an old eagle feather, but would have to rely on documents produced by the seller to determine the feather's age. If it is not possible to tell an old feather from a new feather by sight, dealers could certainly attempt to pass off a new feather as an old feather that was originally part of an object. Only through the prohibition of the sale of all eagle feathers can Congress achieve its stated goal of the protection of bald and golden eagles.

We note that our recommendation is further supported by *Andrus v. Allard*, 444 U.S. 51 (1979). In *Andrus*, the United States Supreme Court heard a different constitutional challenge to the Act. The defendant [*sic*: plaintiffs in *Andrus v. Allard*] argued that

prohibiting the sale of eagle feathers collected before the effective date of the Act violated his Fifth Amendment property rights. *Id.* at 54-55. The defendant made an almost identical argument to the argument advanced by Defendant in this case; he argued that prohibiting the sale of eagle feathers taken before it was against the law to do so did not further Congress's stated purpose of protecting eagles from extinction. *Id.* at 56. However, the defendant in *Andrus* used this argument to support his claim that the Act violated the Fifth Amendment, rather than the commerce clause, as Defendant here argues.

Despite the fact that the Court was not considering a commerce clause challenge, its discussion of the Act is applicable here. In holding that the statute prohibited the sale of old, as well as new, eagle feathers, the Court stated:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Id. at 58-59.

The Supreme Court's discussion in *Andrus* directly supports Plaintiff's position on the Motion before the Court. We recommend that Defendant's Motion be denied, in keeping with prevailing law on the constitutionality of 16 U.S.C. § 668(a).

RECOMMENDATION

For the reasons set forth above, it is recommended that Defendant's Motion to Dismiss Indictment [Docket No. 14] be denied.

Dated: August 23, 2000

/s/ John M. Mason

JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before **September 6, 2000** a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before **September 6, 2000**.

APPENDIX I

BALD AND GOLDEN EAGLE PROTECTION ACT[1]

16 U.S.C. 668(a)(2000)

Whoever,... shall knowingly... take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $ 10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: ... *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of ... any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

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[1] The provisions related to the golden eagle were added on October 24, 1962. Golden Eagle Protection Act, Pub. L 87-884, 76 Stat. 1246 (1962).

APPENDIX J

MIGRATORY BIRD TREATY ACT

16 U.S.C.§ 703 (2000)

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and [Great Britain, the United Mexican States, Japan, and the Union of Soviet Socialist Republics].

16 U.S.C.§ 707(b)(2000)

(b) Whoever, in violation of this subchapter, shall knowingly-

(1) ...

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

APPENDIX K

REGULATION OF THE U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

50 C.F.R.§ 22.2(a)(l) (2)(1999)

(a)(1) You can possess or transport within the United States, without a Federal permit:

(i) ...

(ii) Any live or dead golden eagles, or their parts, nests, or eggs that were lawfully acquired before October 24, 1962.

(2) You may not transport into or out of the United States, import, export, purchase, sell, trade, barter, or offer for purchase, sale, trade, or barter ... golden eagles, or their parts, nests, or eggs of these lawfully acquired pre act birds ....

APPENDIX L

SUPERSEDING INDICTMENT

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JUDGMENT ENTD _____
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

SUPERSEDING INDICTMENT

(16 U.S.C. § 668)
(16 U.S.C. § 703)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(Bald & Golden Eagle Protection Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly offer for sale and sell items that contained golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 2

(Migratory Bird Treaty Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly offer for sale and sell items that contained the parts of a migratory bird, golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness, in violation of Title 16, United States Code, Section 703.

COUNT 3
(Bald & Golden Eagle Protection Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Native American headdress or bonnet that contained golden eagle feathers from a Plains tribe by accepting a $5,000 payment without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 4
(Migratory Bird Treaty Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly sell a Native American headdress or bonnet that contained the parts of a migratory bird, golden eagle feathers, from a Plains tribe by accepting a $5,000 payment, in violation of Title 16, United States Code, Section 703.

COUNT 5
(Bald & Golden Eagle Protection Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly possess and possess with the intent to sell items that contained golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a

feathered fan with a beaded handle without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 6
(Migratory Bird Treaty Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly possess and possess with the intent to sell items that contained the parts of a migratory bird, golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a feathered fan containing the feathers of a scissortail flycatcher, a migratory bird, with a beaded handle, in violation of Title 16, United States Code, Section 703.

COUNT 7
(Bald & Golden Eagle Protection Act)

After January 1, 1997, the specific date unknown to the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 8
(Migratory Bird Treaty Act)

After January 1, 1997, the specific date unknown to

the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person, in violation of Title 16, United States Code, Section 703.

A TRUE BILL

/s/ Paul M. Small
UNITED STATES ATTORNEY

/s/ James W. Kennedy
FOREPERSON

APPENDIX M

INDICTMENT

[Stamped "FILED JUL 07 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

INDICTMENT

(16 U.S.C. § 668)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(Bald & Golden Eagle Protection Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly offer for sale and sell items that contained golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 2

(Bald & Golden Eagle Protection Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Native American headdress or bonnet that contained golden eagle feathers from a Plains tribe by accepting a $3,000 payment without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 3

(Bald & Golden Eagle Protection Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly possess and possess with the intent to sell items that contained golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a feathered fan with a beaded handle without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 4

(Bald & Golden Eagle Protection Act)

After January 1, 1997, the specific date unknown to the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person without being permitted to do so, in violation of Title 16, United States Code, Section 668.

A TRUE BILL

/s/ B. Todd Jones
UNITED STATES ATTORNEY

/s/ Linda Farrell
FOREPERSON

APPENDIX N

AFFIDAVIT OF TIMOTHY P. KORNWOLF

[Stamped "FILED OCT 06 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO: CR 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TIMOTHY PATRICK KORNWOLF,
Defendant.

AFFIDAVIT OF TIMOTHY KORNWOLF

State of Minnesota)
) ss.
County of Hennepin)

I, TIMOTHY PATRICK KORNWOLF, being first duly sworn, depose and say:

1. I am the Defendant in the above-captioned action.

2. My father's mother and father and my mother's father and mother died before I was born.

3. My mother's mother's brother, Nicholas J. Klein, was like a grandfather to me. I called him "Uncle Nick."

4. Nicholas J. Klein never married.

5. The American Indian headdress with tail described in Counts 1, 2, 3, 4, 5, and 6 of the Superseding Indictment filed September 7, 2000, in the above-captioned action [hereinafter "HEADDRESS"] contains golden eagle feathers.

6. Prior to October 24, 1962, Nicholas J. Klein gave me the HEADDRESS.

7. The Sioux Indian dance shield described in Counts 1 and 2 of the Superseding Indictment filed September 7, 2000, in the above-captioned action [hereinafter "SHIELD"] has golden eagle feathers appended to it.

8. Prior to October 24, 1962, Nicholas J. Klein gave me the SHIELD.

9. Nicholas J. Klein was born on or about September 17, 1887, and died on or about April 29, 1968.

10. Nicholas J. Klein told me during his lifetime that he had worked for the Buffalo Bill Wild West Show when he was about 17 years old and that he collected the HEADDRESS and the SHIELD while he worked for the Buffalo Bill Wild West Show.

11. The photograph appended to this affidavit as Exhibit A is an accurate depiction of Nicholas J. Klein.

12. During the entire period from October 24, 1962, until the HEADDRESS was seized by agents of the United States of America on or about January 19, 2000, the HEADDRESS was owned by me and under my possession and control.

13. During the entire period from October 24, 1962, until the SHIELD was transferred to an agent of the United States of America on or about November 1, 1999, the SHIELD was owned by me and under my possession and control.

14. During the entire period from October 24, 1962, until the HEADDRESS was seized by agents of the United States of America on or about January 19, 2000, no feathers were added to the HEADDRESS nor were any feathers replaced.

15. During the entire period from October 24, 1962, until the SHIELD was transferred to an agent of the United States of America on or about November 1, 1999, no feathers were added to the SHIELD nor were any feathers replaced.

9 - 21 - 00

Date

/s/ Timothy Patrick Kornwolf
Timothy Patrick Kornwolf

Subscribed and sworn to before me this 21 day of September, 2000.

/s/ Anna Gherity
Notary Public

[Stamped "ANNA M. GHERITY
(seal) NOTARY PUBLIC – MINNESOTA
My Commission Expires Jan. 31, 2005"]



APPENDIX O

AFFIDAVIT OF TIMOTHY P. KORNWOLF

[Stamped "FILED AUG 16 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ djd"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO: CR 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TIMOTHY PATRICK KORNWOLF,
Defendant.

AFFIDAVIT OF TIMOTHY KORNWOLF

I, TIM KORNWOLF, being first duly sworn, depose and say:

1. I am the Defendant in the above-captioned action.

2. My father's mother and father and my mother's father and mother died before I was born.

3. My mother's mother's brother, Nicholas Klein (whom I called "Uncle Nick"), was like a grandfather to me.

4. Nicolas Klein never married.

5. Prior to October 24, 1962, Nicolas Klein gave me the headdress with tail containing golden eagle feathers that is described in Counts 2 and 3 of the Indictment in the above-captioned action.

6. Prior to October 24, 1962, Nicolas Klein gave me the shield decorated with golden eagle feathers that is described in Count 1 of the Indictment in the above-captioned action.

7. Nicolas Klein died in 1972. This death estimate is an estimate to meet deadlines and his exact birth and death date can be supplied within one week.

8. Nicolas Klein told me during his lifetime that he obtained the headdress described in paragraph 5 above and the shield described in paragraph 6 above while he worked in the Buffalo Bill Wild West Show.

9. The photograph appended to this affidavit as Exhibit A is an accurate depiction of Nicolas Klein.

10. During the entire period from October 24, 1962, until the headdress described in paragraph 5 above was seized by agents of the United States of America, no feathers were added to the headdress nor were any feathers replaced.

11. During the entire period from October 24, 1962, until the shield described in paragraph 6 above was seized by agents of the United States of America, no feathers were added to the shield nor were any feathers replaced.

Date: Aug. 16 - 00

/s/ Tim Kornwolf
Tim Kornwolf

Subscribed and sworn to before me this 16 day of August, 2000.

/s/ Anna Gherity
Notary Public

[Stamped "ANNA M. GHERITY
(seal) NOTARY PUBLIC – MINNESOTA
My Commission Expires Jan. 31, 2005"]



APPENDIX P

PLEA AGREEMENT AND SENTENCING STIPULATIONS

[Stamped "FILED 10-31-00
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

PLEA AGREEMENT AND SENTENCING STIPULATIONS

The United States by its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Clifford B. Wardlaw, Assistant United States Attorney, and the defendant, Timothy Patrick Kornwolf, by himself, and with his attorney, Robert D. Miller, Esq., hereby agree to dispose of this case on the following terms and conditions:

1. The defendant will enter a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2) to Counts 1-4 of the Superseding Indictment which are violations of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. 16 U.S.C. §§ 608 [*sic*: 668] and 703. The defendant reserves the right to challenge Magistrate Judge's and District Court Judge's rulings on pre-trial motions. The United States will defend the validity of federal wildlife statutes and regulations.

2. The government agrees that it will not re-charge [Counts] 5-8 of the Superseding Indictment. Also, the government will not charge the defendant with interstate transportation of stolen property from the Akta Dakota Museum in South Dakota (beaded boy's britches and quirts).

3. The maximum sentence for this offense is 2 years imprisonment; $2,000 fine; one year supervised release; and a special assessment of $100 per count of conviction.

4. The positions found in this document are binding on the parties. The parties understand that the Court will reach an independent determination on an

appropriate sentence. The parties cannot bind the Court. If the Court reaches a determination that is different than that found in this document then the defendant will *not* be able to withdraw his guilty plea.

5. FACTUAL BASIS On or about November 1, 1999, in Stillwater, State and District of Minnesota, the defendant did sell a Sioux dance shield or bustle that contained eight (8) golden eagle feathers for $7,000.

   On or about November 25, 1999, in Stillwater, State and District of Minnesota, the defendant did receive two wire transfers totaling $5,000 for the sale of a Sioux headdress or bonnet that contained golden eagle feathers.

   The defendant did not have a permit from the United States Fish and Wildlife Service as the United States Fish and Wildlife Service does not issue permits for commercial sales of golden eagle feathers.

6. GUIDELINE CALCULATIONS Offenses that involve fish and wildlife is governed by § 2Q2.1. There is a cross reference to the fraud statute (§ 2F1.1) if the value exceeded $2,000.

• Base offense level	6
• Commercial purpose of pecuniary gain (§ 2Q2.1(b)(3)(B))	2
• Value $20,000-$40,000	4
• CITES animal (§ 2Q2.1(b)(3)(B))	4
TOTAL	16

These guideline calculations are binding on the parties. The Court will make an independent guideline calculation.

7. ACCEPTANCE OF RESPONSIBILITY The United States will recommend a two (2) level reduction for acceptance of responsibility. § 3E1.1(a). This recommendation is conditional on three factors: the defendant will testify truthfully at the change of plea hearing; he will cooperate with probation in the Pre-Sentence Report, including a full and complete disclosure of prior criminal convictions; and, he will pay the $400 special assessment before the sentencing hearing. The defendant will argue for an additional one level reduction under § 3E1.1(b). The government will oppose this motion. Whether or not there is a reduction for acceptance of responsibility will be determined by the Court. If the Court declines to award a reduction for acceptance of responsibility then the defendant will *not* be able to withdraw his guilty plea. The government's position is that the final offense level is 14. The defendant's position is that the final offense level is 13. The parties agree that no other adjustments are applicable.

8. CRIMINAL HISTORY The parties believe that the defendant falls into Criminal History Category I. If, however, there is change in this category then the realities will be controlling. A change in the criminal history category will not be a basis to withdraw from this plea agreement.

9. GUIDELINE RANGES Offense level 16/I: 21-27 months; Offense level 14/I: 15-21 months; and, Offense level 13/I: 12-18 months. The government

agrees that it will argue for a term between 15-21 months.

10. DEPARTURES The United States understands that the defendant will move for a downward departure and will oppose this motion.

11. SPECIAL ASSESSMENT The defendant must pay a special assessment of $400 that is due before sentencing. One hundred dollars per count of conviction.

12. SUPERVISED RELEASE If the Court orders a term of imprisonment then a period of supervised release will also be ordered. There is a maximum of one year of supervised release for this offense. Conditions of supervised release will be ordered by the Court. The defendant must abide the terms and conditions of supervised release.

13. FINES The Court in its discretion may order the defendant to pay a fine. The guideline fine range is $4,000 to $40,000 (I/14). The maximum statutory fine is $2,000. 16 U.S.C. § 707(b)(2).

14. There is not agreement as to the assessment of fines and/or costs of prosecution, imprisonment or supervision. The Court in its discretion may order the defendant to pay a fine and/or costs of prosecution, imprisonment or supervision. Any fine or costs assessed against the defendant will be due at sentencing.

15. The defendant may be ordered by the Court to pay restitution to any victims in this case.

16. The defendant's guilty plea is a final determination of guilt. The defendant reserves the right to chal-

lenge the Court's pre-trial rulings. If the defendant prevails on appeal then he will be able to withdraw his guilty plea. If the defendant does *not* prevail on appeal then he will *not* be able to withdraw his guilty plea.

17. The United States agrees that it will not dispose of the evidence that was seized during the investigation. If the defendant prevails then the evidence that was seized will be returned to the defendant. If, however, the appeal is unsuccessful then the United States will retain possession of the evidence and the defendant will have no ownership interest in the evidence that was seized.

18. The defendant understands that by entering into this plea agreement he is waiving his rights to a jury trial. The defendant fully understands his rights to trial. He has had sufficient time to consult with his attorney. His attorney has explained his legal rights and the operation of the sentencing guidelines to him.

19. The defendant has entered into this plea agreement freely and voluntarily. No threats or promises have been made against the defendant other than the consequences of going to trial.

20. The defendant has freely and voluntarily entered into this plea agreement. The defendant has read this agreement and he fully understands all provisions.

DATED: 31 October 2000

/s/ Clifford B. Wardlaw
Clifford B. Wardlaw
Assistant U.S. Attorney

DATED: 10/31/2000

/s/ Timothy P. Kornwolf
Timothy Patrick Kornwolf
Defendant

DATED: 10/31/2000

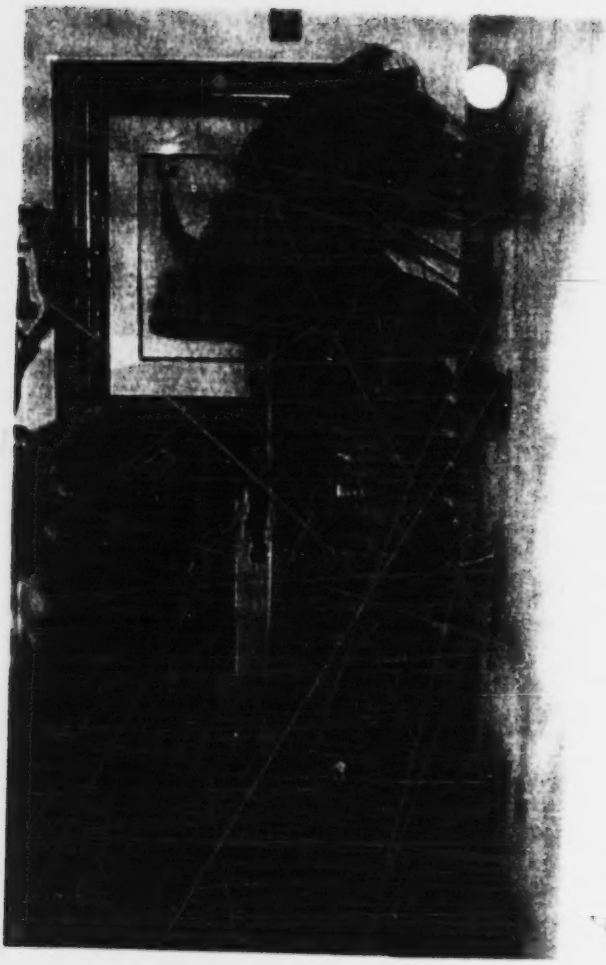
/s/ Robert D. Miller
Robert D. Miller, Esq.
Attorney for Defendant

APPENDIX Q



Government Exhibit #1

APPENDIX R



Government Exhibit #2

APPENDIX S

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March 19,2002

Robert T. Haar, Esq.
Haar & Woods, L.L.P.
1010 Market Street, Suite 1620
St. Louis, MO 63 101

Re: American Indian shields collected by western artist, Henry Farny and acquired in 1938 by Fraser Douglass

Dear Mr. Haar:

This firm represents the family of Fraser Douglass with regard to two Cheyenne Indian shields containing golden eagle feathers. Mr. Douglass, who was in his late 80s when he died last December, spent a career as an art teacher in the Cincinnati Public School system. He was an intense and avid collector and student of American Indian objects, beginning at a time when virtually no art collectors or museums valued them or recognized them as historically important.

These two shields, which would rank among the finest in existence today, were purchased by Mr. Douglass in 1938 from the studio collection of well known western American artist, Henry Farny, who died in 1916. They have been in the Douglass family collection since that time.

Both shields are depicted in a photograph on page 22 of *Henry Farny,* by Denny Carter, Assistant Curator of Paintings of the Cincinnati Art Museum (1978). One of the shields is shown prominently in a Farny painting dated 1900 now in the Amon Carter Museum in Fort Worth, Texas, reproduced on page 178 of Carter's book.

The family wishes to sell the shields. I have advised them that the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, as interpreted and applied by the Supreme Court in *Andrus v. Allard,* prohibit the sale of the shields which contain golden eagle feathers. The eagle feathers could not be removed without destroying the integrity of these two extremely important historic Native American objects.

The Douglass family is representative of people in this country who, on working people's earnings, collected and cared for objects like these without realizing the part they were playing in preserving these for all of us for all time. The vision of a Northern Cheyenne Indian warrior making a shield of buffalo hide, natural paint and eagle feathers, to aid him in resisting the westward expansion of the 19th century while defending his homeland against overwhelming and decimating odds defines the American spirit of which we are all so proud. Now, notwithstanding the historical and symbolic importance of these shields, they cannot be legally sold by families in legal possession of them, even though the objects predate every applicable law by decades.

Although these objects, and others like them, would have a significant monetary value, they may not be sold. The application of these laws needs to be addressed, which I understand you are doing. Legalizing the sale of such antique American Indian items could not conceivably place the eagle in jeopardy. In the interim, and until the laws are changed, I have advised my clients that they must await the outcome of the petition for certiorari which you will be filing with the United States Supreme Court in the *Kornwolf* case and then, ultimately, await a ruling by the Court.

You have the permission of my clients, and my permission, to include a copy of this letter in the petition for a writ of certiorari that you will be filing in the *Kornwolf* case.

Very truly yours,
RENDIGS, FRY, KIELY & DENNIS, L.L.P.

/s/ W. Roger Fry
W. Roger Fry

WRF/tlm

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

(2)

No. 01-1534

In The

Supreme Court of the United States

TIMOTHY P. KORNWOLF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For *Writ* Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE*.... 1

REASON FOR GRANTING *CERTIORARI*..... 3

ARGUMENT

GOVERNMENT MAY NOT DESTROY AN "ESSENTIAL STICK" IN THE BUNDLE OF PROPERTY RIGHTS THAT MAKES UP PROPERTY WITHOUT PAYING JUST COMPENSATION 3

A. *Hodel v. Irving* And *Babbitt v. Youpee* Established That The *Andrus v. Allard* Analysis Used By The Eighth Circuit Has Been Abandoned By This Court To The Point That It No Longer Represents Controlling Precedent Regarding The Fifth Amendment 3

B. In *Lucas v. South Carolina Coastal Council,* This Court Implicitly Abandoned Its Decision In *Andrus v. Allard* When It Found That A Compensable Taking Of Property Had Occurred Despite The Presence Of Other "Strands" Or Essential Sticks In The Bundle Of Rights..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Allard, 444 U.S. 51 (1979) ..... *passim*

Babbitt v. Youpee, 519 U.S. 234 (1997) ..... *passim*

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 114 (1989) 2

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

Glosemeyer v. United States, 45 Fed. Cl. 771 (2000) 2

Hodel v. Irving, 481 U.S. 704 (1987) ..... *passim*

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 4

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 8

Laguna Gatuna v. United States, 50 Fed. Cl. 336 (2001) 2

Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419 (1982) 6

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Madison v. Graham, 126 F. Supp. 2d 1320 (D. Mont. 2001) 2

Miller Brothers v. Department of Natural Resources, 513 N.W. 2d 217 (Mich. App. 1994) 2

Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) 2

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 5

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 5

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 2

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1982) 7

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Kornwolf, 276 F.3d 1014 (8th Cir. 2002) 3, 5

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Timothy P. Kornwolf. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded the right to own, use, and convey property, including the Due Process Clause and the Takings Clause of the Fifth Amendment. For example, MSLF was a party

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

in *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); is counsel for the plaintiffs in *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000), *Laguna Gatuna v. United States*, 50 Fed. Cl. 336 (2001), and *Madison v. Graham*, 126 F. Supp. 2d 1320 (D. Mont. 2001); and participated as an *amicus curiae* in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 114 (1989), *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), and *Miller Brothers v. Department of Natural Resources*, 513 N.W. 2d 217 (Mich. App. 1994). MSLF believes that its expertise on the guarantees of the Constitution regarding private property will assist this Court.

Although this is a criminal case, the legal issues in this case may have a far-reaching effect on all property owners, including members of MSLF. Property and the protections afforded property only have meaning if property rights include the right to own, to use, and to transfer property. In fact, the right to transfer private property is the most "essential stick" in the bundle of rights that makes up property ownership. If the decision of the Eighth Circuit is allowed to stand and government is allowed to make unlawful the sale of property, the constitutional guarantees afforded to private property will have been eviscerated.

REASON FOR GRANTING *CERTIORARI*

This Court should grant *certiorari* to conclusively establish that the ruling in *Andrus v. Allard*, 444 U.S. 51 (1979), which allows government to destroy an "essential stick" in the bundle of rights that makes up private property without paying just compensation, is no longer controlling precedent in light of this Court's rulings in *Hodel v. Irving*, 481 U.S. 704 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Babbitt v. Youpee*, 519 U.S. 234 (1997). *Amicus* contends that this Court's recent rulings have obliterated its earlier ruling in *Allard*. It is clear from the ruling of the Eighth Circuit in *Kornwolf*, that at least one circuit does not believe that *Andrus v. Allard* has been overruled, even implicitly. Therefore, this Court should grant *certiorari* to conclusively establish whether anything remains of *Andrus v. Allard*.

GOVERNMENT MAY NOT DESTROY AN "ESSENTIAL STICK" IN THE BUNDLE OF RIGHTS THAT MAKES UP PROPERTY WITHOUT PAYING JUST COMPENSATION

A. *Hodel v. Irving* And *Babbitt v. Youpee* Established That The *Andrus v. Allard* Analysis Used By The Eighth Circuit Has Been Abandoned By This Court To The Point That It No Longer Represents Controlling Precedent Regarding The Fifth Amendment.

In *Hodel v. Irving*, tribal members challenged the constitutionality of Section 207 of the Indian Land Consolidated Act, which provided that their property would escheat to the tribe upon their deaths, effectively allowing the government to abolish the traditional rights of descent and devise, that is, taking their property for

public use, without just compensation, in violation of the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 703, 709 (1987). Justice O'Connor, writing for the Court, determined that Section 207 went too far and amounted to a taking without just compensation. *Id.* at 718.

Justice O'Connor, quoting the "essential stick" language of *Kaiser Aetna*,[2] determined that Section 207 amounted to the virtual abrogation of an essential stick in the bundle of property rights, that is, the right to pass property on to one's heirs: "In one form or another, the right to pass on property, in particular to one's family, has been part of the Anglo-American legal system since feudal times." *Id.* at 716. This Court held that because Section 207 took away the tribal members' ability to pass property by descent and devise, it destroyed one strand of the bundle of sticks that is property ownership. Even though Section 207 was limited to one strand, that strand was an "essential" one, constituting a taking. *Id.* at 710. Ten years later, this Court again held that Section 207 was an unconstitutional taking because it "severely restrict[ed] the right of an individual to direct the descent of his property," thereby diminishing the owner's right to use and enjoy his property. *Babbitt v. Youpee*, 519 U.S. 234, 244-245 (1997).

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[2] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

This Court's decisions in *Irving* and *Youpee* demonstrate that this Court has all but abandoned its 1979 holding in *Andrus v. Allard*, 444 U.S. 51 (1979).[3] In *Allard*, this Court viewed the bundle of property rights in their entirety and held that, in order for a federal law to violate the Takings Clause, the entire bundle of property rights must have been destroyed. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Allard* at 65,

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[3] Justice Scalia, joined by the Chief Justice and Justice Powell, in a concurring opinion in *Irving*, found that the Court's takings jurisprudence effectively limits *Allard* to its facts:

> I join the opinion of the Court. I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from that statute that was at issue in *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). Because that comparison is determinative of whether there has been a taking, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136, 98 S.Ct. 2646, 2665, 57 L.Ed.2d 631 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922), in finding a taking today our decision effectively limits *Allard* to its facts.

Irving at 719. In *Allard* there was no evidence that the defendants owned the feathers prior to the enactment of the Feather Acts. By contrast, in the instant case, there is uncontroverted evidence that Kornwolf owned the feathers before October 24, 1962, the effective date of the Bald and Golden Eagle Protection Act. *United States v. Kornwolf*, 276 F.3d 1014, 1015 (8th Cir. 2002). Under *Irving* and *Youpee*, Kornwolf has been denied an "essential stick" in the bundle of rights that is property ownership. Thus, his property has been "taken" without just compensation.

66. This Court in *Allard* reasoned that because Allard possessed other property rights, such as the right to possess, transport, and donate his property, the government regulation did not constitute a taking. *Id.* at 66-67. In other words, in *Allard* this Court focused on what rights the law allowed Allard to retain instead of what rights the law took from him. *Id.* Moreover, this Court held that Allard's loss of his right to sell and thus to benefit economically was a mere diminution of the value of his property. *Id.* at 66. "It is, to be sure, undeniable that the regulation here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking." *Id.* In *Irving* and *Youpee*, this Court no longer focused on what rights the tribal members were allowed to retain, but instead focused on whether the rights that had been taken were "essential sticks" in the bundle of rights that is property ownership. *Irving* at 716; *Youpee* at 245.

The Eighth Circuit failed to apply the analysis used by this Court in *Irving* and *Youpee*. Instead, it looked only at the right Kornwolf still possessed, the right to possess ancient Indian artifacts. Ignoring this Court's ruling in *Irving* and *Youpee*, the Eighth Circuit failed to analyze whether the Feather Acts that denied Kornwolf an "essential stick" in his bundle of property rights, that is, the right to sell his property, constituted a regulatory taking.[4]

---

[4] This Court has held that the right to use, possess, and dispose of property are all essential sticks in the bundle of property rights. *See Loretto v. Teleprompter Manhatten CATV*

In both *Irving* and *Youpee*, this Court concluded that it is irrelevant what other sticks the federal government allows people like Kornwolf to retain. What is relevant is whether people like Kornwolf are deprived by the government of an "essential stick," that is, the right to transfer or convey their property. Obviously, Kornwolf was denied an "essential stick" in the bundle of rights that is property ownership. As a result, the Eighth Circuit's decision is contrary to the controlling precedents set forth in *Irving* and *Youpee*. Therefore, this Court must grant *certiorari* to review the Eighth Circuit's holding and to ensure that it comports with the holdings of this Court in *Irving* and *Youpee*.

B. In *Lucas v. South Carolina Coastal Council*, This Court Implicitly Abandoned Its Decision In *Andrus v. Allard* When It Found That A Compensable Taking Of Property Had Occurred Despite The Presence Of Other "Strands" Or Essential Sticks In The Bundle Of Rights.

In 1986, Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes, one for personal use and one to sell to finance his children's education. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). In 1988, South Carolina enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures

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Corp., 485 U.S. 419, 435 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n.6 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).

on his two parcels. Because Lucas' property was rendered worthless, he sued for "just compensation" under the Fifth Amendment of the U.S. Constitution. *Id.* at 1006.

This Court held that a taking had occurred because the Beachfront Management Act denied Lucas "all economically beneficial or productive use" of his property. *Id.* at 1015. *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-296 (1981). In reaching its decision, this Court recognized that other significant strands in Lucas' bundle of property rights remained unaffected by the state law. For instance, Lucas still possessed the right to exclude others, the right to make passive and recreational uses of the parcels, and the right to alienate the property. *Id.* at 1017. However, despite the sticks that still remained, an "essential stick" had been destroyed. Therefore, this Court held that because Lucas was denied an essential stick in his bundle of property rights resulting in the loss of "all economically beneficial use" of his property, he had suffered a taking. *Id.* at 1019. It is evident that this Court's decision in *Lucas* all but destroys its 1979 holding in *Allard* because the Court's analysis in *Lucas* determining whether a taking had occurred is completely different from that undertaken in *Allard*.

In *Lucas*, this Court did not view Lucas' bundle of property rights in its entirety as it had previously in *Allard*, but rather split the bundle into separate identifiable property interests. In so doing, this Court recognized that, although Lucas possessed other property rights, that is, other "sticks" in the bundle of sticks, the right to

economic beneficial use of his property had been destroyed. The *Lucas* Court implicitly but clearly abandoned *Allard* when it analyzed the "sticks" of the bundle separately and determined that a regulation that denied one "stick," one essential stick, constituted a taking. *Id.* at 1015.

Under the Feather Acts, even though Kornwolf still has the right to possess the artifacts, he is prohibited from selling those artifacts, rendering them economically worthless. If the Eighth Circuit had applied *Lucas*, and not *Allard*, the Eighth Circuit would have determined that because the Feather Acts deny Kornwolf all economical beneficial use of his property, the Acts constitute a taking in violation of the Fifth Amendment.

Therefore, this Court must grant *certiorari* to review the Eighth Circuit's holding and to ensure that it comports with the holding of this Court in *Lucas*.

CONCLUSION

In deciding whether the Feather Acts violate the Taking Clause of the Fifth Amendment, the Eighth Circuit applied *Allard*, instead of this Court's most recent decisions in *Irving*, *Youpee*, and *Lucas*. Because the Eighth Circuit erred in applying *Allard*, this Court should grant *certiorari* to resolve whether the ruling in *Allard* that purportedly allows government to destroy an "essential stick" in the bundle of rights that makes up property without paying just compensation is still controlling

precedent in light of this Court's rulings in *Irving*, *Youpee*, and *Lucas*.

Respectfully submitted,

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Dated: April 26, 2002

Supreme Court, U.S.
FILED
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(3)

No. 01-1534

In the Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Based upon his sale of Indian artifacts containing golden eagle feathers, petitioner was charged with violations of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. Petitioner contends that the statutory prohibition against the sale of golden eagle parts, as applied to golden eagle feathers that were lawfully acquired before the effective date of federal protection, effects a taking of property in violation of the Fifth Amendment. The questions presented are as follows:

1. Whether petitioner's takings claim can be asserted as a defense to a criminal prosecution for unlawful sale of golden eagle feathers.

2. Whether application of the statutory prohibition to petitioner's conduct effects a taking of petitioner's property.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Agins v. *City of Tiburon*, 447 U.S. 255 (1980)	10
Andrus v. *Allard*, 444 U.S. 51 (1979)	2, 4, 6, 7, 8, 9, 10
Dolan v. *City of Tigard*, 512 U.S. 374 (1994)	10
Eastern Enter. v. *Apfel*, 524 U.S. 498 (1998)	5
Hagans v. *Lavine*, 415 U.S. 528 (1974)	6
Lewis v. *Casey*, 518 U.S. 343 (1996)	6
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)	9, 10
Nectow v. *Cambridge*, 277 U.S. 183 (1928)	11
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987)	10-11
Preseault v. *ICC*, 494 U.S. 1 (1990)	4, 5
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984)	5
Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002)	8, 9
Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926)	11
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985)	5

Constitution, statutes and regulations:

U.S. Const. Amend. V (Just Compensation Clause)	4
Bald Eagle Protection Act, ch. 278, 54 Stat. 250	2

Statutes and regulations: Page

Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (16 U.S.C. 668 *et seq.*) 2
16 U.S.C. 668 2
16 U.S.C. 668(a) 2
16 U.S.C. 703 2
Tucker Act, 28 U.S.C. 1491 4
50 C.F.R. (2001):
Section 21.2(a) 2
Section 22.2(a)(1)-(2) 2

In the Supreme Court of the United States

No. 01-1534

TIMOTHY PATRICK KORNWOLF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A9) is reported at 276 F.3d 1014. The orders of the district court (Pet. App. A25-A28, A29-A31) are unreported. The reports and recommendations of the magistrate judge (Pet. App. A32-A35, A37-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2002. The petition for a writ of certiorari was filed on April 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a conditional guilty plea, petitioner was convicted of two counts of violating the Bald and Golden Eagle Protection Act and two counts of violating the Migratory Bird Treaty Act. He was sentenced to three years' probation, a fine of $2000, and a special assessment of $400. The court of appeals affirmed. Pet. App. A3-A9.

1. In 1940, Congress enacted the Bald Eagle Protection Act in order to protect this Nation's symbol—the bald eagle—from extinction. See Bald Eagle Protection Act (Eagle Protection Act), ch. 278, 54 Stat. 250; Pet. App. A39 (discussing purpose of the Eagle Protection Act). In 1962, the provisions of the Eagle Protection Act were made applicable to golden eagles. Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (16 U.S.C. 668). The Eagle Protection Act makes it unlawful to sell parts of a bald or golden eagle without a permit and establishes criminal penalties for violations of that ban. 16 U.S.C. 668(a). Likewise, the Migratory Bird Treaty Act prohibits the sale of migratory birds or bird parts without a permit. 16 U.S.C. 703. Both statutes prohibit sales of protected birds or bird parts without regard to when those parts were acquired. Those statutes and implementing regulations do, however, allow the possession and transportation of birds or bird parts that were lawfully obtained before the effective date of federal protection. 16 U.S.C. 668(a); 50 C.F.R. 21.2(a), 22.2(a)(1)-(2); *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

2. On November 1, 1999, petitioner sold for $7000 a Native American dance shield containing eight golden eagle feathers to an undercover agent working with the United States Fish and Wildlife Service. Pet. App. A5.

Petitioner subsequently received an additional $5000 from the agent as a deposit for the sale of a Native American headdress that also contained golden eagle feathers. *Ibid.* Petitioner was charged in a superseding indictment with multiple violations of the Eagle Protection Act and the Migratory Bird Treaty Act. *Id.* at A48-A52. Petitioner moved to dismiss the superseding indictment, asserting that the prohibition on the sale of the shield and headdress effected an unconstitutional taking of his property. *Id.* at A33-A34, A38-A40. Petitioner asserted that he had lawfully acquired the artifacts before October 24, 1962, the date that the Eagle Protection Act was made applicable to golden eagles. See *id.* at A62-A63.

3. The magistrate judge recommended that petitioner's motion to dismiss the superseding indictment be denied. Pet. App. A37-A44. The district court adopted the report and recommendation of the magistrate judge. *Id.* at A29-A31. After the district court denied petitioner's motion to dismiss the superseding indictment, petitioner entered a conditional guilty plea to two counts of violating the Eagle Protection Act and two counts of violating the Migratory Bird Treaty Act. *Id.* at A65-A71; see *id.* at A49-A50. Petitioner reserved his right to challenge the pre-trial rulings of the district court. *Id.* at A66. Petitioner was sentenced to three years' probation (subject to a special condition that he participate for 180 days in a home detention program), a fine of $2000, and a special assessment of $400. *Id.* at A4 n.2. The district court declined to order petitioner to return the $12,000 that he had received for the dance shield and the headdress. *Id.* at A4.

4. The court of appeals affirmed. Pet. App. A3-A9. The court rejected petitioner's takings claim, holding that the constitutional question was controlled by this

Court's decision in *Andrus* v. *Allard*, *supra*. Pet. App. A5-A9. The court explained that, although the decision in *Allard* "did not directly address feathers owned by an individual prior to the effective dates of the" relevant statutes, the Court's reasoning in that case "extends to include feathers acquired prior to the passing of the Bald and Golden Eagle Protection Act." *Id.* at A6. The court also observed that petitioner had received compensation for the artifacts because the district court refused to order him to disgorge the $12,000 that he had received from the undercover agent. *Id.* at A8.

ARGUMENT

1. Petitioner raises his takings challenge as a defense to a criminal prosecution. Pet. App. A26-A27. The Just Compensation Clause, however, does not afford a defense to the criminal charges in this case. As this Court has explained, the Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. It is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990) (citation and internal quotation marks omitted). Thus, even if the statutory ban on the sale of golden eagle feathers effected a taking of petitioner's property, that prohibition would be constitutionally valid and enforceable so long as a just compensation remedy is available.

Because the Tucker Act, 28 U.S.C. 1491, allows petitioner to seek just compensation in the Court of Federal Claims, petitioner is not entitled to raise a takings claim as a defense to a criminal prosecution. See

Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) ("taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act"); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984). A statute may be declared unconstitutional on the ground that it effects a taking of property if Congress has manifested an "unambiguous intention to withdraw the Tucker Act remedy." *Preseault*, 494 U.S. at 12 (quoting *Monsanto*, 467 U.S. at 1019); see, *e.g.*, *Eastern Enter.* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) (the "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds," because Congress would not likely have intended to provide compensation from the Treasury for monetary payments compelled by federal law). Petitioner identifies no evidence, however, suggesting that Congress has withdrawn the Tucker Act remedy with respect to any takings of property that might result from the Eagle Protection Act or the Migratory Bird Treaty Act, nor has he actually sought compensation in the Court of Federal Claims.

Petitioner contends that he is entitled to reversal of his convictions because "[a] criminal statute is unconstitutional on its face or as applied where it conflicts with some guarantee of the Bill of Rights, and the unconstitutionality of the statute is a defense in a criminal prosecution." Pet. 27. Petitioner further suggests that the Tucker Act remedy is inadequate because the Court of Federal Claims "can only award money damages" and "cannot reverse a criminal conviction, reimburse criminal fines, or restore a citizen's good name." Pet. 28 n.15. Those arguments misconceive the nature of the

constitutional guarantee on which petitioner relies. A taking of property does not conflict with any provision of the Bill of Rights so long as the government pays just compensation to the property's owner. Because the Tucker Act remedy is fully sufficient to satisfy constitutional requirements, petitioner's claim that the Eagle Protection and Migratory Bird Treaty Acts effect a taking does not call the validity of those statutes into question, and it therefore cannot be raised as a defense to a criminal prosecution.[1]

2. Even if petitioner's takings challenge were properly raised in defense of a criminal prosecution, that claim lacks merit.

a. The appellees in *Allard* contended that the Eagle Protection Act and the Migratory Bird Act "do not forbid the sale of appellees' artifacts insofar as the constituent birds' parts were obtained prior to the effective dates of the statutes," and that "if the statutes and regulations do apply to such property, they violate the Fifth Amendment." 444 U.S. at 54-55. The Court

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[1] Petitioner also states that "[a] similar Tucker Act argument was made in *Allard* and implicitly rejected by the *Allard* Court." Pet. 28 n.15. *Allard* predates this Court's decisions in such cases as *Preseault* and *Monsanto*, which clarified the principle that a statute may not be set aside on the ground that it effects a taking so long as a just compensation remedy remains available. And because the Court in *Allard* did not explain its decision to consider the merits of the appellees' takings claim, its "implicit[]" (Pet. 28 n.15) holding that the claim was properly before it is entitled to no precedential weight. Cf., *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) (Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974) ("when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it].").

rejected those contentions. In holding that the Eagle Protection Act was applicable to eagle feathers lawfully acquired before the effective date of the statutory ban on sales of golden eagle parts, the Court explained:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Id. at 58. The Court reached the same conclusion with respect to the Migratory Bird Treaty Act. See *id.* at 59-64.

The Court "also disagree[d] with the District Court's holding that, as construed to authorize the prohibition of commercial transactions in pre-existing avian artifacts, the Eagle Protection and Migratory Bird Treaty Acts violate appellees' Fifth Amendment property rights because the prohibition wholly deprives them of the opportunity to earn a profit from those relics." 444 U.S. at 64; see *id.* at 64-69. The Court explained that

> [t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one

> traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66. The Court also observed that "it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.* at 66. The *Allard* Court's takings analysis is equally applicable here.[2]

b. In *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), this Court recently reaffirmed the principle announced in *Allard* that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.* at 1481 (quoting *Allard*, 444 U.S. at 65-66). The Court observed that "[t]his requirement that the 'aggregate must be viewed in its entirety' explains why, for example, a regulation that prohibited commercial trans-

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[2] Petitioner contends that he acquired the artifacts at issue in this case before October 24, 1962, when the Eagle Protection Act was made applicable to golden eagle parts. Pet. App. A62-A63. As the court of appeals observed, "*Allard* did not directly address feathers owned by an individual prior to the effective dates of the acts." *Id.* at A6. The appellees in *Allard* alleged that the feathers in question had been lawfully acquired before the effective date of federal protection, but they did not allege that *they* had obtained the feathers before that date. See 444 U.S. at 54-55. The *Allard* Court's takings analysis, however, did not turn on that factual distinction. See Pet. App. A6-A7.

actions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking." *Ibid.* (quoting *Allard*, 444 U.S. at 66). The Court's decision in *Tahoe-Sierra* refutes petitioner's contention (Pet. 15-20) that the core principle on which *Allard* rests has been undermined by subsequent rulings of this Court.

c. Petitioner contends (Pet. 21-26) that the ban on sale of golden eagle feathers, by destroying the market for those items, effects a categorical taking of property under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Petitioner's reliance on *Lucas* is misplaced. First, as petitioner acknowledges (Pet. 22), the Court in *Lucas* expressly distinguished for purposes of takings analysis between real and personal property:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion * * * that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027-1028 (citations omitted).

Second, *Tahoe-Sierra* makes clear that "the categorical rule [of *Lucas*] would not apply if the diminution in value were 95% instead of 100%." 122 S. Ct. at 1483. As the Court recognized in *Allard*, the Eagle Protection and Migratory Bird Treaty Acts allowed petitioner

to sell his artifacts with the contraband feathers removed, 444 U.S. at 68 n.25, and to charge admission fees for viewing the artifacts, *id.* at 66. *Lucas* therefore provides no support for petitioner's contention that the federal ban on the sale of golden eagle feathers rendered his property valueless or effected a categorical taking.

d. The Court in *Allard* upheld the federal ban on the sale of eagle parts lawfully acquired before the effective date of federal protection, based in part on its determination that "[i]t was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles." 444 U.S. at 58. Petitioner contends (Pet. 8-15) that *Allard* has been called into question by *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), which stated that "[t]he application of a general zoning law * * * effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land." In petitioner's view (see Pet. 10), the phrase "substantially advance" imposes a more demanding standard than the reasonableness analysis that the *Allard* Court employed. That argument lacks merit.

First, the passage in *Agins* on which petitioner relies applies by its terms to *land-use regulation*, not to regulation of commercial transactions involving personal property. See 447 U.S. at 260 (describing circumstances under which "[t]he application of a general zoning law * * * effects a taking"). Subsequent decisions of this Court have used the phrase "substantially advance" with specific reference to regulation of real property. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas*, 505 U.S. at 1016; *Nollan* v.

California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987). Petitioner cites no decision in which this Court has used the phrase in connection with regulation of other commercial transactions. As *Lucas* makes clear, the takings principles that govern land-use regulation cannot be mechanically applied to other commercial settings. See p. 9, *supra*.

Second, the *Agins* Court's use of the phrase "substantially advance" was supported by citation to *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), in which the Court stated that a restriction on private development adopted as part of a municipal zoning plan generally "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Ibid.* (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). In setting forth the legal principles governing its review, the *Nectow* Court observed that

> a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. at 187-188 (quoting *Village of Euclid*, 272 U.S. at 395). Thus, even with respect to land-use regulation, there is no reason to suppose that the *Agins* Court intended the phrase "substantially advance" to require more than a reasonable relationship between means and ends.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1534

IN THE

Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court Of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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17pp

TABLE OF CONTENTS

Table of Authorities iii

Petitioner's Reply Brief 1

Conclusion 10

TABLE OF AUTHORITIES

Cases	Page(s)
Agins v. Tiburon, 447 U.S. 255 (1980)	9
Andrus v. Allard, 444 U.S. 51 (1979)	2-4, 8-10
Armstrong v. United States, 364 U.S. 40 (1960)	10
Babbitt v. Youpee, 519 U.S. 234 (1997)	4, 8, 10
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	9
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	7
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)	8
Hodel v. Irving, 481 U.S. 704 (1987)	4, 8, 10
Lott v. United States, 11 Cl.Ct. 852 (1987)	7
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	8
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	3, 10
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	4
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	5

Nectow v. Cambridge,
277 U.S. 183 (1928) 2

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 2, 9-10

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 8

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 4

Preseault v. Interstate Commerce Comm'n,
494 U.S. 1 (1990) 6-7

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 6

Sanders v. United States,
252 F.3d 1329 (Fed. Cir. 2001)..... 7

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 6

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
122 S.Ct. 1465 (2002) 3-4

Touby v. United States,
500 U.S. 160 (1991) 5

United States v. General Motors Corp.,
323 U.S. 373 (1945) 4

United States v. Kepler,
531 F.2d 796 (6th Cir. 1976) 9

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 2

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 6-7

Yee v. City of Escondido, 503 U.S. 519 (1992) 9

Constitutional Provisions:

U.S. Const. amend. V ..... *passim*

Statutes:

28 U.S.C. §1491 5

Secondary Sources:

Brief for Appellants, *Andrus v. Allard*, 444 U.S. 51 (1979) 8

Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Juris 2d., §3532.1 (1984) 6

Charles M. Haar & Michael A. Wolf, *Commentary:* Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv.L.Rev. 2158 (2002) 2-3

Joseph L. Heller, *Catch-22* 2

PETITIONER'S REPLY BRIEF

Kornwolf has been criminally convicted at the instance of the federal government for selling property which he not only indisputably owned, but which also is innocuous and historically significant. The government does not dispute that Kornwolf had no reason to suspect when he obtained this property decades ago that its sale would one day be criminal. The purported justification for criminalizing this most basic of commercial transactions is protection of the living golden eagle, yet the feathers that are an integral part of this property are from birds which died a century ago. Neither Kornwolf nor any other owner of antique feathered Indian artifacts has ever had the benefit of a judicial determination that denying them possibly the most fundamental aspect of property ownership has contributed in any way to protection of the golden eagle. At the same time, prosecutions such as this undoubtedly promote destruction of antique Indian artifacts.

The government's response to Kornwolf's claim that this prosecution is an unconstitutional taking of his property is that the Fifth Amendment primarily protects real as opposed to personal property, a proposition that finds no support in the history or text of the Fifth Amendment. In response to Kornwolf's argument that he has been denied all economic value in his property — because sale is the only practical means of realizing value for a non-income-producing asset — the government blithely suggests he can destroy the artifact and try to sell some part of it or pitch a tent and charge admission to see it. And although the government maintains that Kornwolf has no right to compensation, it suggests its own Catch-22, that this Court cannot consider Kornwolf's constitutional arguments because he has not sought compensation from the Court of

Federal Claims, where compensation will most certainly be denied on the strength of *Andrus v. Allard*, 444 U.S. 51 (1979), a case only this Court can clarify, modify or overrule. According to the government, Kornwolf is required to seek compensation in the Court of Federal Claims even though the relief he wants is reversal of his conviction and restoration of his good name — relief clearly beyond the jurisdiction of that court.

That the "logic" of the government's position invites comparisons to Joseph Heller's *Catch-22* illustrates the existing uncertainty and confusion about the scope of the Fifth Amendment Takings Clause. The need for guidance from the Court is even more evident upon closer examination of the government's argument. The government, for example, maintains that the "substantially advance" requirement pertains only to regulation of real estate and, in any event, is only a "reasonableness" test. The government, however, does not justify with logic or case law its assertion that this standard is limited to real estate. The Takings Clause of the Fifth Amendment embodies no such distinction.

The government's contention that the "substantially advance" standard is nothing other than a reasonableness test which has remained static since *Nectow v. Cambridge*, 277 U.S. 183 (1928), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is squarely contradicted by *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987), and by any considered reading of the Court's takings cases over the last twenty years. Two well-respected experts have recently observed that "[a]lthough the phrase 'substantial relation' appeared in *Euclid*, the meaning of those two words had changed considerably in the interim between *Euclid* and *Nollan*." Charles M. Haar & Michael

A. Wolf, *Commentary:* Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv.L.Rev. 2158, 2186 (2002) (footnote omitted). They also note:

> In the 1920s, decades before the Warren Court adopted the levels-of-scrutiny approach still in use today, a "substantial" relation suggested reasonableness — nothing more and nothing less. Beginning in the 1970s, however, use of the word "substantial" in Supreme Court constitutional scrutiny parlance suggested a step up from the most minimal form of review.

Id. (footnotes omitted). That the government can nevertheless assert in its Brief in Opposition in this case that nothing has changed in the last 75 years is a testament to a need for clarification that only this Court can provide.

Although *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002), became the first opinion of the Court in 15 years to rely on *Allard*, it did nothing to resolve the tension between *Allard* and subsequent opinions of the Court or otherwise elucidate the Court's takings jurisprudence. First, there was no real dispute among the *Tahoe-Sierra* parties that the development restriction at issue "substantially advanced" the protection of Lake Tahoe. *Id.* at 1474 & n.9. Therefore, *Tahoe-Sierra* sheds no light on that standard. Second, *Tahoe-Sierra* distinguished *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on the ground that *Lucas* involved a permanent ban on development under "a statute 'that wholly eliminated the value' of Lucas' fee simple title" as opposed to the temporary development ban at issue in *Tahoe-Sierra*. 122 S.Ct. at 1483, *quoting Lucas*, 505 U.S. at 1026. Kornwolf's case involves a *permanent* ban on sale, and *Tahoe-Sierra* does not explain how a

permanent ban on sale of an asset such as a feathered Indian artifact can do anything but destroy its economic value. Finally, although *Tahoe-Sierra* cites with approval the *Allard* proposition that the destruction of one strand in a bundle of rights does not constitute a taking, it does nothing to explain or resolve the conflict between *Allard*, on the one hand, and *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), on the other. The latter two cases the government simply chooses to ignore. In sum, *Tahoe-Sierra* highlights rather than obviates the need for review here.

In opposing the Petition for Writ of Certiorari ("Petition"), the government also relies on an argument that was not a basis for decision in the courts below and was implicitly rejected in *Andrus v. Allard*, 444 U.S. 51 (1979), *i.e.*, that the Fifth Amendment Takings Clause cannot be invoked as a defense in a criminal prosecution.

Timothy Kornwolf has been prosecuted for exercising what this Court has recognized as one of the fundamental rights of property ownership: "that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167-68 (1998), *citing United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and *dispose of it*.") "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . ." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). This Court has repeatedly found that if the conduct which is the subject of a criminal prosecution falls within the protections of the

Constitution, those Constitutional rights are defenses to the criminal prosecution. Petition at 27 & n.14.[1]

The government contends, however, that Kornwolf cannot raise a taking of his artifacts as a defense, because "even if the statutory ban on the sale of golden eagle feathers effected a taking of petitioner's property, that prohibition would be constitutionally valid and enforceable so long as a just compensation remedy is available." Brief for the United States in Opposition at 4. The government further maintains that "[b]ecause the Tucker Act, 28 U.S.C. 1491, allows petitioner to seek just compensation in the Court of Federal Claims, petitioner is not entitled to raise a takings claim as a defense to a criminal prosecution." *Id.*

In essence, the government argues that the only remedy for a taking by the federal government is a Tucker Act claim, and it cites in support of this proposition civil cases where this Court's concerns were ripeness and the prematurity of the takings claim. These cases do not stand for the proposition that the

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[1]In *Touby v. United States*, 500 U.S. 160 (1991), the Court held that it was appropriate to raise as a criminal defense whether the Drug Enforcement Administration's authority to designate a drug temporarily as a schedule I controlled substance was an unconstitutional delegation of legislative power even though the pertinent statute barred judicial review of temporary designations and provided administrative avenues for challenging the final designation. *Id.* at 168-69. As Justice Marshall observed in his concurrence, "Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law." *Id.* at 170. *See Moore v. City of East Cleveland*, 431 U.S. 494, 497 n.5 (1977) ("this Court has never held that a general principle of exhaustion could foreclose a criminal defendant from asserting constitutional invalidity of the statute under which she is being prosecuted").

only remedy for a taking by the federal government is a Tucker Act claim, and they certainly do not support the proposition that an unconstitutional taking cannot be raised as a defense in a criminal prosecution. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990) (takings claim under National Trails System Act premature because even if the Trails Act did effect a taking, the plaintiffs had not sought just compensation under the Tucker Act); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("taking claim is not yet ripe [because] respondent did not seek compensation through the procedures the State has provided for doing so"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) ("Because we hold the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions . . . we conclude that Monsanto's [Fifth Amendment challenges] are not ripe for our resolution.")

Under the ripeness doctrine, the federal courts cannot render a decision unless there is a "genuine need to resolve a real dispute." Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Juris 2d., §3532.1 (1984). It is the product of both Article III limitations on federal court jurisdiction and prudential concerns. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 n.7 (1997). When courts have dismissed Takings Clause claims as premature, they have held, in essence, that the property owner does not have a case or controversy with the government appropriate for adjudication until and unless the property owner has been denied just compensation.

The concerns underlying the Court's holdings in *Preseault*, *Williamson County*, and *Monsanto* are not

present when a criminal defendant challenges the constitutionality of a statute. Kornwolf obviously has an immediate, concrete controversy with the government: he has been criminally convicted and faces the immediate prospect of criminal sanctions for violating what he maintains to be an unconstitutional statute. Indeed, the very cases upon which the government relies require that there be a "reasonable, certain and adequate provision for obtaining compensation" before the failure to pursue that remedy can render a takings claim premature. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (internal citations omitted); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Even if it were theoretically possible to seek compensation for the headdress and dance shield in the Court of Federal Claims under the Tucker Act, that court cannot restore Kornwolf's liberty or his good name, which are the principal losses arising from this criminal prosecution and the redress he seeks. *See Lott v. United States*, 11 Cl.Ct. 852 (1987) (Court of Claims does not have power to review and overturn convictions).[2]

Where a compensation remedy is not "reasonable, certain and adequate," other forms of relief are appropriate in the context of a takings claim, including declaratory and equitable relief. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978) (Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable

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[2] *Cf. Sanders v. United States*, 252 F.3d 1329, 1335-36 (Fed. Cir. 2001) ("[i]t is particularly unreasonable to suppose that Congress in enacting the Tucker Act intended for [the Court of Federal Claims] to intervene in the delicate and sensitive business of conducting criminal trials") (internal citations omitted).

damages are sustained"). As Justice O'Connor observed for the plurality in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521-22 (1998), not only is relief other than compensation proper, but this Court has granted equitable relief from Taking Clause violations arising from federal legislation without even discussing the applicability of the Tucker Act. This includes the two cases that raised takings issues most analogous to those in this case: *Babbitt v. Youpee*, 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987). *See also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-2 (1935) (Brandeis, J.) (holding Frazier-Lemke Act void as applied because it violated Fifth Amendment Takings Clause).[3]

This Court in *Andrus v. Allard*, 444 U.S. 51 (1979), obviously asserted jurisdiction in a declaratory judgment action despite the government's argument that the case was not ripe under the Tucker Act. *See* Brief for the Appellants in *Andrus v. Allard*, 13, 33-34. Although the Court rejected the Tucker Act argument *sub silentio*, its observations on standing reflect the significance of criminal sanctions in overcoming the Article III and prudential concerns raised by the government.

> The Secretary has raised the question of appellees' standing to assert a takings claim with respect to their artifacts. . . . All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself, suffices to give them standing to litigate their interest in the construction of the statutes.

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[3] As Justice Stevens observed in his separate opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 639 n.1 (2001) (Stevens, J., concurring in part and dissenting in part), "A regulation that goes so 'far' that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle. . ."

Allard, 444 U.S. at 64 n.21. *See also United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (considering Takings Clause defense to criminal conviction under the Endangered Species Act). While the Court is not bound by this exercise of jurisdiction in *Allard*, "neither should [it] disregard the implications of an exercise of judicial authority assumed to be proper." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

The government's Tucker Act argument also ignores that a ground for Kornwolf's Fifth Amendment argument is that the Bald and Golden Eagle Protection Act does not "substantially advance" the protection of the golden eagle. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court held that a challenge to a rent control ordinance was ripe even though the petitioner had not sought rent increases. Writing for the majority, Justice O'Connor observed:

> [Petitioners] allege in this Court that the ordinance does not "substantially advance" a "legitimate state interest" no matter how it is applied. See *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at 834; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.

Yee, 503 U.S. at 533-34. So even if the government's Tucker Act argument were correct, it would not preclude Kornwolf from arguing that his prosecution is unconstitutional because the ban on sale of feathered Indian artifacts does not substantially advance protection of the golden eagle.

CONCLUSION

As stated in the Petition, *Allard* remains an anomalous and puzzling precedent and the doctrinal inconsistency between *Allard* and cases like *Irving*, *Nollan*, *Lucas* and *Youpee*, which has been noted by numerous commentators, remains one of the principal obstacles to a coherent takings jurisprudence. This case presents the Court with a unique opportunity to revisit *Allard* and resolve the confusion that it continues to engender.

Petitioner Timothy Kornwolf respectfully requests that the Court grant his Petition, and thereby not only clarify the scope of the important Fifth Amendment protections at issue, but also restore "fairness and justice" to owners of antique Indian artifacts who play an important role in preserving this country's Native American heritage. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Respectfully submitted,

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